CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, and Notices

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 29 **JULY 5, 1995** **NO. 27**

This issue contains:

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

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U.S. Customs Service

General Notices

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, June 20, 1995.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

HARVEY B. FOX,
Director,
Office of Regulations and Rulings.

MODIFICATION OF RULING LETTERS ALLOWING THE COUNTRY OF ORIGIN INDICATOR "ASSEMBLED IN" ON ARTICLES ELIGIBLE FOR ENTRY UNDER SUBHEADING 9802.00.80, HTSUS

ACTION: Notice of withdrawal of the proposed modification of ruling letters allowing the country of origin indicator "Assembled in" on articles containing foreign components.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), this notice advises interested parties that the advance ruling request concerning the use of the legend "Assembled in" on articles eligible for subheading 9802.00.80, HTSUS, treatment, was withdrawn by the interested party on June 8, 1995. Consequently, Customs is withdrawing the notice proposing to modify rulings which have allowed the country of origin marking indicator "Assembled in" on articles eligible for subheading 9802.00.80, HTSUS, treatment, and not made entirely of U.S. components. Notice of the proposed modification was published on May 10, 1995, in the "CUSTOMS BULLETIN," Volume 29, Number 19.

EFFECTIVE DATE: Effective immediately.

FOR FURTHER INFORMATION CONTACT: Monika Rice, Special Classification & Marking Branch, (202–482–6980).

SUPPLEMENTARY INFORMATION:

BACKGROUND

In response to an advance ruling request dated August 16, 1994, a notice was published on May 10, 1995, in the "CUSTOMS BULLETIN," Volume 29, Number 19, pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), advising interested parties that Customs intended to modify rulings which have allowed the country of origin marking indicator "Assembled in" on articles eligible for subheading 9802.00.80, HTSUS, treatment, and not made entirely of U.S. components. The comment period expired on June 9, 1995, and 19 comments were received. The notice advised that prior to the issuance of the proposed ruling, set forth as Attachment M, several rulings required modification, which were in conflict with other rulings relying on the express terms of 19 CFR 10.22 to allow the country of origin indicator "Assembled in" only if the article eligible for entry under subheading 9802.00.80, HTSUS, was "entirely made up of American-made materials." However, on June 8, 1995, the advance ruling request was withdrawn.

As noted in Headquarters Ruling Letter 731507 dated October 17, 1989, the use of he legend "Assembled in" under the provisions of 19 CFR 10.22 has been the source of considerable confusion. In an effort to allay this confusion, Customs originally intended to issue a notice of proposed rulemaking to remove 19 CFR 10.22 in conjunction with the amendments of the interim Customs Regulations, published in the "Federal Register" on January 3, 1993, as T.D. 94–4. The notice of proposed rulemaking of "Rules for Determining the Country of Origin of a Good for Purposes of Annex 311 of the North American Free Trade Agreement; Rules of Origin Applicable to Imported Merchandise" was published on May 5, 1995, in the "Federal Register," 60 Fed. Reg. 22312. Both notices in the "Federal Register" and "CUSTOMS BULLETIN" indicate that but for the application of 19 CFR 10.22, the country of origin of an article eligible for entry under subheading 9802.00.80, HTSUS, may not necessarily be the country where it was assembled if the interim Part 102, Customs Regulations, or substantial transformation test are followed. Accordingly the May 5, 1995, "Federal Register" notice proposes to remove 19 CFR 10.22.

Since the advance ruling request was withdrawn, the proposal published in the May 10, 1995 "CUSTOMS BULLETIN" is hereby withdrawn. Customs will address the issue as originally intended in connection with the May 5, 1995, "Federal Register" notice of proposed rulemaking. The comment period for the May 5, 1995, notice was extended until July 19, 1995. *See* 60 Fed. Reg. 29520 (June 5, 1995). If the proposal to repeal 19 CFR 10.22 is adopted as a final rule, Customs may adopt new regulations which prescribe the circumstances for the general use of the words "Assembled in" as a country of origin indicator. In the interim

period, however, Customs will continue to accept all articles eligible for subheading 9802.00.80, HTSUS, treatment, marked with the country of origin indicator "Assembled in," whether they are made entirely of American-made components or not.

Dated: June 14, 1995.

SANDRA L. GETHERS,
(for John Durant, Director,
Commercial Rulings Division.)

PROPOSED MODIFICATION OF CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF A PARALLEL PORT ASSEMBLY

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 [19 U.S.C. 1625(c)(1)], as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling pertaining to the tariff classification of a parallel port assembly. Comments are invited on the correctness of the proposed ruling.

DATE: Comments must be received on or before August 4, 1995.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1301 Constitution Avenue, NW, (Franklin Court), Washington, DC 20229. Comments submitted may be inspected at the Commercial Rulings Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th Street, NW, Suite 4000, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Robert Altneu, Metals and Machinery Classification Branch, (202) 482–7030.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 [19 U.S.C. 1625(c)(1)], as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested par-

ties that Customs intends to modify a ruling pertaining to the tariff classification of a parallel port assembly.

In New York 806816, issued on March 2, 1995, by the area Director of Customs, New York Seaport, a parallel port assembly was classified under subheading 8544.41.00, Harmonized Tariff Schedule of the United States (HTSUS), as other insulated electrical conductors, whether or not fitted with connectors, for a voltage not exceeding 80 V. This ruling was based upon the limited information provided and no sample was furnished for examination. NY 806816 is set forth in "Attachment A" to this document.

Based upon additional information obtained and examination of a sample of the parallel port assembly, Customs Headquarters is of the opinion that the merchandise meets the definition of an automatic data processing unit as described in Legal Note 5(B) to chapter 84, HTSUS. The parallel port assembly is provided for as a control and adapter unit for automatic data processing machines under subheading 8471.99.15, HTSUS.

Customs intends to modify NY 806816 to reflect the proper classification of the parallel port assembly under subheading 8471.99.15, HTSUS, a provision for control and adapter units. Before taking this action, we will give consideration to any written comments timely received. Proposed Headquarters ruling 957962 modifying NY 806816 is set forth in "Attachment B" to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: June 16, 1995.

MARVIN M. AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, March 2, 1995.

CLA–2–85:S:N:N1:112–806816
Category: Classification
Tariff No. 8544.41.0000

MR. DENNIS R. MUELLER
QUANTUM CONSULTING ASSOCIATES
1375 Florida Avenue, Suite B
Longmont, CO 80501

Re: The tariff classification of parallel port cable assembly and power cord connector assembly from Hong Kong or Taiwan.

DEAR MR. MUELLER:

This classification decision under the Harmonized Tariff schedule of the United States (HTS) is being issued in accordance with the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

DATE OF INQUIRY:	January 31, 1995.
ON BEHALF OF:	Datasonix Corporation.
DESCRIPTION OF MERCHANDISE:	The parallel port cable assembly allows for the connection of both the tape storage unit and a printer via a single parallel port to the CPU. Based on the schematic for the power cord, the diagram indicated a power plug on one end and 1 mini-DIN 6 plug on the other. It appears to be nothing more than an electrical cable.
HTS PROVISION:	Insulated electrical conductors, whether or not fitted with connectors: Other electric conductors, for a voltage not exceeding 80 V: Fitted with connectors.
HTS SUBHEADING:	8544.41.0000
RATE OF DUTY:	4.8 percent *ad valorem*

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JEAN F. MAGUIRE,
Area Director,
New York Seaport.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC

CLA–2 R:C:M 957962 RFA
Category: Classification
Tariff No. 8471.99.15

MR. DENNIS R. MUELLER
QUANTUM CONSULTING ASSOCIATES
1375 Florida Avenue, Suite B
Longmont, CO 80501

Re: Parallel port assembly; automatic data processing (ADP) units; control and adapter units; insulated electrical conductors, whether or not fitted with connectors; legal note 5(B) to chapter 84; headings 8473, 8544; HQs 954695, 952554; NY 806816, modified.

DEAR MR. MUELLER:

This is in regards to New York (NY) 806816 issued to you on March 2, 1995, on behalf of Datasonix Corporation, by the Area Director, New York Seaport, which classified a parallel

port assembly under subheading 8544.41.00, Harmonized Tariff Schedule of the United States (HTSUS), as other insulated electrical conductors, whether or not fitted with connector, for a voltage not exceeding 80 V. In a letter, dated May 4, 1995, you requested that we review that ruling along with the additional information submitted. We have reviewed this matter and are of the opinion that classification under subheading 8544.41.00, HTSUS, is incorrect.

Facts:

The subject merchandise is a parallel port assembly ("PPA"), model number 000022–22, which consists of the following components: data cable with an attached parallel port 25-pin connector; printed circuit board ("PCB") that contains resistors, capacitors, integrated circuit (IC) chips, two connector ports for the attachment to an automatic data processing (ADP) printer and the Datasonix Pereos tape storage unit; and two plastic covers for the PCB assembly. The Pereos tape storage unit is a small, compact and lightweight (approximately 10 ounces) ADP storage unit which stores data on a miniature tape cartridge with a capacity of 1.25 gigabytes.

The PPA allows a user to connect the Pereos tape storage unit to a printer and the parallel port connection of a computer. In addition to forming the connection between the three automatic data processing (ADP) units (computer, printer, and tape storage), the PPA directs and helps control the electronic signals between the three units, allowing for the almost simultaneous operations of data retrieval and printing.

Issue:

Is the parallel port assembly classifiable as an insulated cable with connectors, or as an ADP unit under the HTSUS?

Law and Analysis:

Classification of merchandise under the HTSUS is in accordance with the General Rules of Interpretation (GRI's). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes.

In NY 806816, dated March 2, 1995, Customs determined that the PPA was classifiable under subheading 8544.41.00, HTSUS, which provides for other insulated electrical conductors, whether or not fitted with connectors, for a voltage not exceeding 80 V.

You claim that the PPA is properly classifiable under heading 8473, HTSUS, as parts and accessories of ADP machines. To be classified as an ADP machine, merchandise must meet the criteria in Legal Note 5(B) to Chapter 84, HTSUS, which defines units of ADP machines as follows:

> Automatic data processing machines may be in the form of systems consisting of a variable number of separately-housed units. A unit is to be regarded as being a part of the complete system if it meets all the following conditions:
>
> (a) it is connectable to the central processing unit either directly or through one or more other units;
>
> (b) it is specifically designed as part of such a system (it must, in particular, unless it is a power supply unit, be able to accept or deliver data in a form (code or signals) which can be used by the system).

The PPA meets the definition of Legal Note 5(B) because it connects to a computer's central processing unit (CPU), a printer and the Pereos tape storage unit, and it is able to accept or deliver data in a form which can be used by the system. *See* HQ 954695 (November 18, 1993) and HQ 952554 (January 4, 1993).

The Harmonized Commodity Description and Coding System Explanatory Notes (EN) constitute the Customs Cooperation Council's official interpretation of the HTSUS. While not legally binding, the ENs provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. *See* T.D. 89–80, 54 FR 35127, 35128 (August 23, 1989). EN 84.71(I)(D), page 1299, describes separately presented ADP units as follows:

> This heading also covers separately presented constituent units of data processing systems. Constituent units are those defined in Parts (A) and (B) above as being parts of a complete system.
>
> Apart from central processing units and input and output units, examples of such units include:
>
> * * * * * * *

(4) Control and adapter units such as those to effect interconnection of the central processing unit to other digital data processing machines, or to groups of input or output units which may comprise visual display units, remote terminals, etc.

We believe that the PPA acts as a control and adapter unit to effect interconnection of the computer's CPU to the printer and the data storage unit and is therefore, classifiable under subheading 8471.99.15, HTSUS, as control and adapter units for ADP machines. Because the PPA is classifiable as an ADP control unit under heading 8471, HTSUS, classification under heading 8473, HTSUS, as a part of an ADP unit is precluded.

Holding:

The parallel port assembly, model number 000022–22, is classifiable under subheading 8471.99.15, HTSUS, which provides for: "[a]utomatic data processing machines and units thereof: [o]ther: [o]ther: [c]ontrol or adapter units* * *." The general, column one rate of duty is free.

Effect On Other Rulings:

NY 806816, dated March 2, 1995, is modified as to the classification of PPA.

JOHN DURANT,
Director,
Commercial Rulings Division.

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Dominick L. DiCarlo

Judges

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Jane A. Restani
Thomas J. Aquilino, Jr.
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R. Kenton Musgrave
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Decisions of the United States Court of International Trade

PUBLIC VERSION

(Slip Op. 95–107)

MICRON TECHNOLOGY, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND HYUNDAI ELECTRONICS INDUSTRIES CO., LTD., ET AL., DEFENDANT-INTERVENORS

Consolidated Court No. 93–06–00318

[Remanded to U.S. Department of Commerce, International Trade Administration, for reconsideration of final antidumping duty determination in accordance with instructions herein.]

(Dated June 12, 1995)

Hale and Dorr (Gilbert B. Kaplan, Paul W. Jameson, Cris R. Revaz), for plaintiff Micron Technology, Inc.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(A. David Lafer, Marc E. Montalbine)*; Office of the Chief Counsel for Import Administration, United States Department of Commerce *(Patrick V. Gallagher, Jr., Paul A. Ortiz)*, of counsel, for defendant.

Graham & James (Lawrence R. Walders, Jeffrey L. Snyder, Andrea Fekkes Dynes, Matthew E. Marquis, James C. Allard) for defendant-intervenors Hyundai Electronics Industries Co., Ltd. and Hyundai Electronics America, Inc.

Kaye, Scholer, Fierman, Hays & Handler (Michael P. House, Raymond Paretzky) for defendant-intervenors LG Semicon Co., Ltd. and LG Semicon America, Inc.

Akin, Gump, Strauss, Hauer, & Feld, L.L.P. (Sukhan Kim, Spencer S. Griffith, D. Michael Kaye, Susan M. Erickson) for defendant-intervenors Samsung Electronics Co., Ltd. and Samsung Semiconductor, Inc.

MEMORANDUM AND OPINION

GOLDBERG, *Judge:* This matter is before the court on the parties' motions for judgment on the agency record made pursuant to USCIT Rule 56.2. Petitioner, Micron Technology, Inc. ("Micron") and respondents: Hyundai Electronics Industries Co., Ltd. and Hyundai Electronics America, Inc. (collectively, "Hyundai"); LG Semicon Co., Ltd. and LG Semicon America, Inc. (collectively, "Semicon"); and Samsung Elec-

tronics Co., Ltd. and Samsung Semiconductor, Inc. (collectively, "Samsung"), contest various aspects of the final determination of sales at less than fair value issued and amended by the United States Department of Commerce, International Trade Administration ("Commerce"), concerning dynamic random access memory semiconductors ("DRAMs") of one megabit ("1M") and above from the Republic of Korea. *Dynamic Random Access Memory Semiconductors of One Megabit and Above from the Republic of Korea,* 58 Fed. Reg. 15,467 (Mar. 23, 1993) *("Final Determination"); Dynamic Random Access Memory Semiconductors of One Megabit and Above from the Republic of Korea,* 58 Fed. Reg. 27,520 (May 10, 1993) *("Amended Final Determination").* The court exercises its jurisdiction pursuant to 28 U.S.C. § 1581(c) (1988).

I. BACKGROUND

On April 22, 1992, Micron filed with Commerce a petition alleging, *inter alia,* that Korean DRAMs of one megabit and above were being sold in the United States at less than fair value, and that home market sales of the DRAMs were taking place at prices less than the cost of production. *See Dynamic Random Access Memory Semiconductors of One Megabit and Above From the Republic of Korea,* 57 Fed. Reg. 21,231 (May 19, 1992) *("Initiation of Investigation").* In response to Micron's petition, Commerce initiated an investigation of Korean DRAMs covering the period from November 1, 1991 through April 30, 1992. *Final Determination,* 58 Fed. Reg. 15,467, 15,468. On March 23, 1993, Commerce published its *Final Determination* of sales at less than fair value. *Final Determination,* 58 Fed. Reg. at 15,467. To correct errors contained in the *Final Determination,* Commerce issued an amended final determination on May 6, 1993. *Amended Final Determination,* 58 Fed. Reg. at 27,520.

II. DISCUSSION

In deciding a motion for judgment on the agency record, the court assesses whether Commerce's determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1988). Substantial evidence is something more than a mere scintilla. *Ceramica Regiomontana, S.A. v. United States,* 10 CIT 399, 405, 636 F. Supp. 961, 966 (1986) (citations omitted), *aff'd,* 5 Fed. Cir. (T) 77, 810 F.2d 1137 (1987). Substantial evidence consists of "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Matsushita Elec. Indus. Co. v. United States,* 3 Fed. Cir. (T) 44, 51, 750 F.2d 927, 933 (1984) (citation omitted).

In moving for judgment on the agency record, the parties raise a total of fifteen issues for the court's review. Specifically, the parties contest the following aspects of Commerce's *Final Determination,* as amended: (1) whether Commerce properly allocated research and development costs on the basis of aggregate rather than product-specific data; (2) whether Commerce properly allocated interest expense based upon

semiconductor fixed assets; (3) whether Commerce properly identified and corrected an error related to the allocation of Hyundai's interest expense; (4) whether Commerce properly applied a time lag when comparing cost of production and constructed value to sales; (5) whether Commerce properly included and expensed translation losses in calculating cost of production; (6) whether Commerce properly used BIA to adjust Samsung's reported depreciation expense; (7) whether Commerce's choice of best information available for calculating Samsung's depreciation expenses was proper; (8) whether Commerce properly deducted U.S. direct selling expenses from Hyundai's exporter's sales price; (9) whether Commerce properly reclassified Semicon's capitalized costs of facility construction and testing; (10) whether Commerce properly included a small volume of sales of "off-spec" merchandise in its calculations for Semicon; (11) whether Commerce treated Semicon's sales of "Product 12" properly; (12) whether Commerce properly included future generations of DRAMs within the scope of its investigation; (13) whether Commerce properly verified Hyundai's cost of production questionnaire response; (14) whether Commerce properly verified Semicon's cost of production questionnaire response; and (15) whether Commerce properly determined that Samsung and [ ] are not related parties. Each will be addressed in turn.

1. *Commerce's Allocation of Research and Development Costs:*

Hyundai, Samsung, and Semicon ("respondents"), each challenge the methodology chosen by Commerce to allocate research and development ("R&D") costs for the purpose of calculating the cost of production ("COP") of the subject DRAMs. Respondents raise two objections to Commerce's allocation methodology; each will be considered in turn.

First, respondents challenge Commerce's decision to calculate the R&D costs related to the subject DRAMs by allocating the R&D costs related to all semiconductors over the total cost of sales for all semiconductors. Commerce allocated R&D costs using aggregate data rather than product-specific data based upon its determination that, "[b]ecause the general underlying technology is the same for all semiconductor products, the benefits from the results of R&D, even if intended to advance the design or manufacture of a specific product, provide an intrinsic benefit to other semiconductor products." *Final Determination,* 58 Fed. Reg. at 15,472. Respondents contend that the administrative record compiled in this case does not support Commerce's conclusion that R&D cross-fertilization in the semiconductor industry warrants the use of aggregate data to allocate R&D costs for the subject DRAMs. The court agrees.

To begin, the court recognizes that R&D cross-fertilization may justify allocating R&D costs on an aggregate, rather than product-specific, basis. Indeed, if substantial record evidence supports a determination that the subject merchandise benefits from R&D expenditures earmarked for non-subject merchandise, it would then be appropriate to

account for such expenditures in calculating the cost of producing the subject merchandise. The court emphasizes, however, that the validity of Commerce's methodology cannot rest on intuitive appeal alone; rather, the factual premise upon which Commerce bases its choice of methodology must be supported by substantial evidence on the record. Upon review, the court finds that in this particular instance it is not.

Significantly, in defending its choice of methodology, Commerce fails to direct the court to any record evidence of R&D cross-fertilization in the semiconductor industry. *See Defendant's Response Brief* at 5–8. Instead, the defendant offers mere speculation, stating that "there is an overlap of technology between different semiconductors, the result of which is that R&D performed for one model *may* provide a benefit to another model." *Id.* at 6–7 (emphasis added). Micron attempts to justify Commerce's methodology by citing to a single remark offered by a Micron official at the hearing before Commerce, indicating that R&D related to one aspect of one particular product will likely benefit current and future generations of DRAMs. *Micron's Opposition Brief* at 22–23. If R&D cross-fertilization in the semiconductor industry is as widespread as defendant claims, one would expect an abundance of corroborating evidence which supports and expands upon the statement offered by the Micron official. Yet, there is none. Standing alone, this statement offered by a self-interested party after the record had been closed hardly constitutes substantial evidence upon which Commerce could base so sweeping a determination.

In contrast, respondents provide ample citation to verified record evidence tending to show that the subject merchandise did not derive an intrinsic benefit from R&D related to other semiconductor products. Most notably, the bulk of Semicon's R&D expenditures related to the subject merchandise consisted of [ ]. *Semicon's R.56.2 Brief* at 17–19. In addition, Samsung notes that [ ]. *Samsung's R.56.2 Brief* at 32–37. Neither Commerce nor Micron adequately address this substantial record evidence supporting respondents' position.

For the foregoing reasons, upon reviewing the entirety of the record compiled in this case, the court concludes that Commerce's determination that R&D related to non-subject merchandise provided an intrinsic benefit to other semiconductor products such as the subject DRAMs, is not supported by substantial evidence. As a result, the court remands this issue with instructions that Commerce recalculate respondents' COP by allocating R&D costs on a product-specific basis. Commerce shall then amend its *Final Determination* accordingly.

Second, respondents challenge Commerce's decision to reject Korean generally accepted accounting principles ("GAAP"), which permit amortization of R&D expenses over a three to five year period; instead, Commerce expensed respondents' R&D costs in the year in which they were incurred. Respondents argue that Commerce's methodology rep-

resents a departure from past practice for which the agency has failed to provide an adequate explanation. The court agrees.

Commerce will apply the GAAP of the home country if it is satisfied that those principles reasonably reflect all of the costs associated with production of the subject merchandise. *See, e.g., Camargo Correa Metais, S.A. v. United States,* 17 CIT ____, ____, Slip Op. 93–163 at 4 (Aug. 13, 1993). In the following determinations, Commerce uniformly amortized R&D costs related to the subject merchandise rather than expensing such costs in the year incurred: *Certain Welded Stainless Steel Pipe From the Republic of Korea,* 57 Fed. Reg. 53,693, 53,705 (Nov. 12, 1992) (final determination); *Polyethylene Terephthalate Film, Sheet, and Strip From the Republic of Korea,* 56 Fed. Reg. 16,305, 16,312–13 (Apr. 22, 1991) (final determination); *Certain Small Business Telephone Systems and Subassemblies Thereof From Korea,* 54 Fed. Reg. 53,141, 53,149 (Dec. 27, 1989) (final determination); *Color Television Receivers From Korea,* 53 Fed. Reg. 24,975, 24,982 (July 1, 1988) (final results of admin. review); *Erasable Programmable Read Only Memories (EPROMs) From Japan,* 51 Fed. Reg. 39,680, 39,682 (Oct. 30, 1986) (final determination); *64K Dynamic Random Access Memory Components (64K DRAMs) From Japan,* 51 Fed. Reg. 15,943, 15,944–45 (Apr. 29, 1986) (final determination); *Cellular Mobile Telephones and Subassemblies From Japan,* 50 Fed. Reg. 45,447, 45,453 (Oct. 31, 1985) (final determination); *Cell Site Transceivers From Japan,* 49 Fed. Reg. 43,080, 43,082–83 (Oct. 26, 1984) (final determination). These investigations reflect an established practice on the part of Commerce to amortize R&D expenses related to the subject merchandise in accordance with home market GAAP, which Commerce found not to be distortional, for the purpose of allocating such costs over the market life of the product.

Commerce may abandon or reverse an established practice or policy and continue to enjoy deference from the courts. *See, e.g., Mantex, Inc. v. United States,* 17 CIT ____, ____, Slip Op. 93–242 at 27 (Dec. 22, 1993) (citation omitted). Such deference, however, is predicated upon a finding that Commerce's decision to revise its position is based upon a reasoned analysis. *See Rust v. Sullivan,* 500 U.S. 173, 186–87 (citing *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 42–43 (1983)). Upon review, the court finds that Commerce has failed to articulate a reasoned analysis justifying the departure from its established practice of amortizing those R&D expenses related to merchandise under investigation.

To begin, Commerce contends that it has not deviated from its past practice in this case. Defendant distinguishes the prior investigations in which Commerce amortized R&D costs by arguing that the products at issue in those investigations did not have the same inherent technological characteristics of semiconductors; specifically, defendant focuses upon the fact that the semiconductor industry is "R&D intensive." *Defendant's Response Brief* at 7–8. This distinction is patently false.

Defendant fails to acknowledge that in two previous semiconductor cases, i.e. *EPROMs From Japan* and *64K DRAMs From Japan,* Commerce specifically endorsed capitalization and amortization of R&D expenses. Commerce makes no attempt to distinguish these cases, or to counter the language contained therein.[1] As a result, the court finds defendant's argument unavailing.

Commerce offered two justifications for expensing R&D costs in its *Final Determination.* First, Commerce concluded that amortization of R&D was inappropriate "because R&D costs can never be assigned to the proper product or time." 58 Fed. Reg. at 15,472. As noted, however, Commerce has failed to establish that R&D related to non-subject merchandise provided an intrinsic benefit to the subject DRAMs. In addition, Commerce verified the product-specific R&D data submitted by respondents. Furthermore, the record in this case shows that the DRAM industry follows a fairly predictable three and one-half to four year life cycle.[2] Notably, this product life cycle is approximated by the three to five year amortization period afforded under Korean GAAP. Commerce was therefore incorrect in concluding that neither the proper product nor time period can be ascertained.

Second, Commerce concluded that amortization was inappropriate because, "in many instances[,] full amortization occurs prior to the introduction of the product in the marketplace." 58 Fed. Reg. at 15,473. Initially, the court notes the absence of record evidence to support this statement. In any event, to the extent that this may be true, Commerce's methodology is even more distortional because it guarantees that R&D costs will not be allocated over the commercial life of the product. In contrast, Korean GAAP provides for a reasonable allocation of the R&D costs associated with production of the subject DRAMs. Commerce's argument fails to establish otherwise.

Finally, the court notes that Commerce itself acknowledged that R&D activities in one period will benefit future periods. *See Final Determination,* 58 Fed. Reg. at 15,472 (technological changes and improved manufacturing methods will benefit future production). Yet, Commerce proceeded to contravene this finding by expensing R&D costs in the year incurred. Commerce's methodology is thus irreconcilable with the record compiled in this case.

For the foregoing reasons, the court concludes that Commerce has failed to articulate a reasoned analysis in support of its decision to abandon its prior practice of amortizing R&D costs associated with production of the investigated merchandise. The court also concludes that

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[1] Specifically, in *EPROMs From Japan,* Commerce stated:

> The Department applied its R&D methodology developed for products which require a significant research and development effort. The Department capitalized those R&D costs specifically associated with the product * * *. These costs are capitalized and amortized over the sales during the market life of the product.

51 Fed. Reg. at 39,682. Similarly, in *64K DRAMs From Japan,* Commerce stated:

> The Department's method of accounting for research and development (R&D) expenses encompassed the historic R&D for 64K DRAMs allocated over the market life of the product * * *.

51 Fed. Reg. at 15,944–45.

[2] *Confidential Document ("Confid. Doc.") 211* at 3.

Commerce has failed to establish that Korean GAAP does not reasonably reflect the R&D costs related to the subject DRAMs. Accordingly, this issue is remanded with instructions that Commerce use amortized rather than current R&D expenses in its calculations. Commerce shall then amend its *Final Determination* accordingly.

2. *Commerce's Allocation of Interest Expense Based Upon Semiconductor Fixed Assets:*

Samsung and Hyundai contend that Commerce erred in allocating interest expense based upon semiconductor fixed assets rather than the cost of goods sold. Specifically, Samsung and Hyundai argue that Commerce has consistently allocated interest expense on the basis of the consolidated cost of sales ("COS") and has rejected allocation on the basis of fixed assets. Samsung and Hyundai further argue that Commerce has failed to provide a reasoned analysis justifying its departure from past practice, and that Commerce's stated rationale actually supports allocation of interest expense on the basis of COS in this case.

Commerce acknowledges that it generally allocates interest expense based upon the consolidated cost of sales. In adopting a different methodology for this investigation, Commerce stated:

> After reviewing the facts in this case, we have found that for Samsung and Hyundai, a larger proportion of total fixed assets are related to the semiconductor line of business than to other lines of business* * *. [B]ecause of this disproportional amount of fixed assets related to semiconductors, allocation of interest expense based on cost of sales would not appropriately recognize the expense related to the capital investment necessary for semiconductors compared to the other lines of business.

Final Determination, 58 Fed. Reg. at 15,471–72. Commerce therefore abandoned its COS methodology, and instead allocated interest expense to the subject merchandise on the basis of the ratio of the value of semiconductor fixed assets to company-wide fixed assets. *Id.* at 15,472. Although the COS methodology would appear to account for the capital intensive nature of the semiconductor industry in the form of increased depreciation expenses, the court cannot fault Commerce for rejecting this approach in favor of another plausible methodology that, in Commerce's view, better accounts for this characteristic of the semiconductor industry. The choice between alternative methodologies, each of which is supported by substantial evidence and in accordance with law, is clearly left to Commerce's discretion. *Cf. Matsushita Elec. Indus. Co. v. United States*, 3 Fed. Cir. (T) 44, 54, 750 F.2d 927, 936 (1984) (it is not the court's function to decide that it would have made another decision on the basis of the evidence). Upon review, the court concludes that Commerce provided a reasoned analysis for rejecting its COS methodology, and that substantial record evidence supports Commerce's decision to allocate interest expense based upon semiconductor fixed assets. Accordingly, this aspect of Commerce's *Final Determination* is sustained.

The court also finds, however, that Commerce's implementation of the methodology chosen in this case was arbitrary. Commerce's questionnaire *required* respondents to allocate interest expense among their various products on the basis of COS.[3] Respondents conformed their responses accordingly. Notably, Commerce did not state any change of policy in the preliminary determination, or at any time during the investigation. Indeed, Commerce verified respondents' interest expense calculations, and did not list interest expense allocation methodology as an issue for consideration in its verification reports. The first time this issue was raised was in Micron's pre-hearing brief before Commerce. As a result, because Commerce failed to request the appropriate data, Commerce was forced to resort to surrogate data based upon semiconductor depreciation expenses, in lieu of actual data regarding semiconductor fixed assets.

As defendant states, "[i]t cannot be seriously questioned that the semiconductor industry is highly capital intensive." *Defendant's Response Brief* at 10. The basis for Commerce's adoption of an asset-based allocation methodology was clearly evident prior to the inception of this investigation. Yet, Commerce failed to apprise respondents of its intent to depart from past practice regarding the allocation of interest expense due to the capital intensive nature of the semiconductor industry. Nor did Commerce request the requisite data for proper implementation of its alternative methodology. Instead, Commerce required respondents to submit the exact data it ultimately rejected as being inadequate for this investigation.

Commerce is presumably in the best position to know what information will satisfy its requirements. *Creswell Trading Co. v. United States,* 13 Fed. Cir. (T) ____, ____, 15 F.3d 1054, 1062 (1994). On the facts of this case, Commerce's failure to notify plaintiffs of its intent to abandon its COS methodology and instead allocate interest expense on the basis of semiconductor fixed assets, coupled with its failure to request data regarding semiconductor fixed assets, deprived respondents of meaningful participation in the investigation as to this issue, and renders Commerce's use of surrogate data unsupported by substantial evidence and not in accordance with law. *See Usinor Sacilor v. United States,* 19 CIT ____, ____, Slip Op. 95–94 at 69–70 (May 19, 1995) (Commerce's failure to request necessary information, or to notify respondents that it lacked such information, rendered its determination unsupported by substantial evidence and otherwise contrary to law); *cf. Mantex, Inc. v. United States,* 17 CIT ____, ____, 841 F. Supp. 1290, 1303 (1993) (court sustained Commerce's reversal of policy in an administrative review where Commerce announced reconsideration of that policy more than two and one-half years before issuing its preliminary review, and where Commerce ultimately reversed its policy four days before issuing its preliminary review). Accordingly, the court remands this issue with

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[3] *Public Document ("Pub. Doc.") 143,* section D at 15.

instructions that Commerce reopen the record in order to afford respondents an opportunity to present actual data regarding semiconductor fixed assets. Commerce shall then amend its *Final Determination* accordingly.

3. *Commerce's Identification and Correction of an Error Related to the Allocation of Hyundai's Interest Expense:*

Following publication of the *Final Determination,* Commerce revised Hyundai's interest allocation in order to correct an apparent error. Specifically, Commerce concluded that Hyundai's depreciation summary, upon which Commerce relied to estimate semiconductor fixed assets, failed to include an amount for depreciation on certain buildings which housed semiconductor production. As a result, Commerce reallocated Hyundai's interest expense based upon the ratio of semiconductor machinery and equipment ("M&E") to total M&E.

Hyundai objects to Commerce's identification and correction of the alleged deficiency in its submission. As noted, however, the court remands the general issue of interest allocation in order to afford respondents an opportunity to present Commerce with actual data regarding semiconductor fixed assets. *See supra* part II.2. Upon remand, Commerce is directed to utilize such actual data regarding Hyundai's semiconductor fixed assets in Commerce's allocation of interest expense. In the event Hyundai proves unable to produce actual data, the court will address Hyundai's objections to Commerce's treatment of the alleged error contained in Hyundai's depreciation data in the court's review of the results of remand to Commerce.

4. *Commerce's Use of a Time Lag When Comparing Constructed Value and Cost of Production to Sales:*

Semicon and Hyundai challenge Commerce's decision to use a time lag when comparing cost of production and constructed value ("CV") to sales. Specifically, respondents allege that Commerce's incorporation of a time lag was unnecessary and redundant because their respective cost accounting systems fully captured all historical costs. The court disagrees.

At verification, Commerce found that in the ordinary course of business Semicon's DRAM manufacturing costs are [ ]. *Confid. Doc. 174* at 12. However, for purposes of its cost response, Semicon allocated costs upon a quarterly basis. *Id.* at 12–13. With regard to Hyundai, at verification Commerce found that Hyundai's cost accounting system prepares unit costing information [ ]. *Confid. Doc. 175* at 12. However, Hyundai's cost response calculated product costs upon a monthly basis. *Id.* at 13. As a result, although respondents' cost accounting systems may have captured all historical costs, Commerce remained unconvinced that respondents' cost accounting properly allocated costs to specific units of output.

Commerce's concern stems from the nature of the DRAM production process. DRAMs require approximately [ ] months to produce, from the time that the raw wafer is inserted into the process

to the time that a completed, tested DRAM is ready for shipment. The cost in a given month for each stage of DRAM production is therefore not the cost of the individual DRAMs that emerge from the end of the line during that month. This distinction is important because the semiconductor industry is characterized by relatively rapidly declining per-unit costs due to increases in yield, design changes, and other efficiency improvements over time. Consequently, in order to properly match sales for a given period to the costs of manufacture related to those sales, Commerce adopted a time lag comprised of: (1) the time that completed dies were in inventory prior to being input into the assembly process; (2) the time required to assemble the dies into finished DRAMs and for testing; and (3) the average inventory period of finished DRAMs.

Upon review, the court finds that Semicon and Hyundai fail to establish that their respective cost accounting systems properly allocate costs to specific units of output. The court further concludes that Commerce's incorporation of a time lag comprised of the three aforementioned components is supported by substantial evidence and in accordance with law. Accordingly, this aspect of Commerce's *Final Determination* is sustained.

Semicon further contends that Commerce's decision to lag costs for short inventory periods, as it did in this case, is unprecedented. Citing *EPROMs From Japan,* Semicon argues that even in prior semiconductor investigations in which Commerce applied a lag for work in process, Commerce refused to make an adjustment for the finished goods inventory period. *EPROMs From Japan,* 51 Fed. Reg. at 39,685. The court finds Semicon's reliance upon *EPROMs From Japan* misplaced. Specifically, the court notes that the sole reason why Commerce did not apply a lag for the finished goods inventory period in *EPROMs From Japan* was because Commerce concluded that there was insufficient evidence on the record to support such an adjustment. *Id.* In contrast, the record in this case fully supports Commerce's decision to include a lag for the finished goods inventory period. *See, e.g., Confid. Doc. 174* at 3. Accordingly, this aspect of Commerce's *Final Determination* is sustained.

Hyundai raises two additional objections to this aspect of Commerce's *Final Determination.* First, Hyundai argues that Commerce arbitrarily applied a [ ] lag for all of Hyundai's sales, rather than identifying specific periods for different types of transactions, as Commerce did for the other two respondents. The court agrees. For Samsung and Semicon, Commerce first calculated the average lag time for each production stage, i.e. inventory, assembly, and test; Commerce then calculated a lag period for each type of transaction under consideration, i.e. COP, CV-ESP (exporter's sales price), and CV-PP (purchase price). *Confid. Doc. 203* at 5; *Confid. Doc. 204* at 6–7. Commerce fails to explain why it employed a different methodology to calculate lag periods for Hyundai. Indeed, defendant makes no attempt to justify the disparate treatment accorded Hyundai with regard to this issue. *See Defendant's Response Brief* at 10–14. Moreover, the court can discern no basis in the

record to support Commerce's adoption of one methodology for Samsung and Semicon, but an alternative methodology for Hyundai. *See Confid. Doc. 203* at 5, ¶ 7 (indicating Commerce intended to be consistent between each respondent with regard to Commerce's adoption of a time lag). For the foregoing reasons, the court finds that Commerce's decision to employ a [ ] lag for all of Hyundai's sales is not supported by substantial evidence in the record and is otherwise not in accordance with law. Accordingly, the court remands this issue with instructions that Commerce recalculate Hyundai's lag periods utilizing the same methodology that Commerce employed for Samsung and Semicon.

Second, Hyundai points to 19 U.S.C. § 1677b(e)(1)(A) (1988), which provides that constructed value shall include the cost of materials and fabrication "at a time preceding the date of exportation of the merchandise under consideration which would ordinarily permit the production of that particular merchandise in the ordinary course of business." With regard to production of model HY514400, Commerce compared the prices for [ ] units sold in the United States in [ ] with the constructed value of the first [ ] DRAMs produced in [ ]. In light of this comparison, Hyundai argues that Commerce's methodology is inconsistent with § 1677b(e)(1)(A), at least as it pertains to model HY514400. The court agrees. Commerce has failed to establish that Hyundai's production line for model HY514400 was sufficiently established in [ ] to permit production of [ ] units in the ordinary course of business. With regard to model HY514400, therefore, Commerce is specifically directed upon remand to determine a new lag which accurately matches costs to the sales in question.

5. *Commerce's Decision to Recognize and Expense Translation Losses in Calculating Cost of Production:*

Hyundai, Samsung and Semicon each challenge Commerce's decision to include all foreign exchange translation gains and losses during the POI in its calculation of the general and administrative ("G&A") expense component of COP. Foreign exchange translation gains and losses are unrealized adjustments based upon the conversion of outstanding foreign currency monetary assets and liabilities into domestic currency (i.e. the Korean won, in this case), for purposes of inclusion on a company's balance sheet. In contrast, foreign exchange *transaction* gains and losses are actual gains and losses experienced with respect to payments made during the POI resulting from exchange rate fluctuation between the date of transaction and the date of payment. In accordance with Korean GAAP, with respect to foreign exchange translation losses in excess of five percent of the capital stock of the respective company, respondents amortized such losses over a three to five year period. Commerce, however, rejected Korean GAAP and instead expensed all

translation losses related to the POI, including losses in excess of five percent of capital stock.

Respondents first contend that translation losses are hypothetical losses only, which in no way represent actual costs of production; accordingly, respondents argue that Commerce erred by including translation losses in its COP calculations. The court disagrees. Although translation losses are unrealized, as there is no actual outflow of funds from the company, the resulting exposure to increased liability for borrowed funds caused by fluctuations in the exchange rate is by no means hypothetical. Admittedly, fluctuations in the exchange rate that occur subsequent to the POI may affect the magnitude of translation losses measured during the POI; indeed, subsequent fluctuations may eliminate translation losses entirely, such that the company may eventually recognize a transaction gain at the time the underlying liability is extinguished. Notwithstanding the contingent nature of translation losses, however, such losses are akin to an increased cost of borrowing funds that should be included in any reasonable measure of the cost climate faced by the company during the POI. *Cf. Usinor Sacilor v. United States,* 19 CIT ____, Slip Op. 95–94 at 14–15 (contingent nature of liabilities on loan instruments did not alter fact that such instruments were debt upon issuance and remained so until their conversion into common stock) (citation omitted). Thus, to the extent that respondents' translation losses resulted from debt associated with production of the subject merchandise, such losses are a legitimate component of COP. Significantly, Korean GAAP reflects as much by requiring that translation losses be recognized in the year in which they are incurred, to the extent such losses do not exceed five percent of the company's capital stock. For the foregoing reasons, the court sustains Commerce's decision to include translation losses in its COP calculations.

Second, respondents argue that Commerce has failed to establish that the companies' translation losses are related to production of the subject merchandise. With regard to Hyundai, Commerce's cost verification report notes that company officials indicated that all translation losses were related to borrowings for fab lines. Hyundai fails to point to any record evidence to the contrary. Accordingly, Commerce's determination that Hyundai's translation losses are related to production of the subject merchandise is sustained. With regard to Samsung and Semicon, however, it is unclear whether substantial evidence on the record supports the conclusion that the companies' translation losses are related to DRAM production. Accordingly, the court remands this issue to Commerce. Upon remand, Commerce is directed to identify what evidence on the record supports the conclusion that the translation losses of Samsung and Semicon are related to production of the subject merchandise. Should Commerce determine that there is insufficient evidence on the record to support such a conclusion, Commerce shall exclude translation losses from the calculation of COP for Samsung and Semicon.

Third, respondents contend that Commerce erred by expensing translation losses which the companies had deferred to future years pursuant to Korean GAAP. As noted, in determining whether merchandise has been sold at less than cost, Commerce will employ the GAAP of the home market of the country of exportation if Commerce is satisfied that such accounting principles reasonably reflect the cost of producing the subject merchandise. *Laclede Steel Co. v. United States*, 18 CIT ____, Slip Op. 94–160 at 21–22 (Oct. 12, 1994) (citation omitted). Respondents argue that Commerce failed to demonstrate that Korean GAAP distorts actual costs. The court disagrees. Because translation losses relate directly to events occurring during the POI, they should not be deferred to future periods. The mere size of the loss does not alter the principle that the loss should be related to the period in which the exchange rate fluctuates. As Commerce recognized, amortization of translation losses under Korean GAAP is distortional because, if deferred, such losses "would not be appropriately matched to the sales of the company during the POI." *Final Determination*, 58 Fed. Reg. at 15,471. Accordingly, the court sustains Commerce's decision to reject Korean GAAP and instead expense all translation losses related to the POI.

6. *Commerce's Decision to Use BIA to Adjust Samsung's Reported Depreciation Expense:*

Samsung challenges Commerce's decision to use best information available ("BIA") to adjust Samsung's reported depreciation expense. Commerce may resort to the best information otherwise available whenever a party refuses or is unable to produce requested information, in the requisite form, in a timely fashion. 19 U.S.C. § 1677e(c) (1988). Prior to this investigation, Samsung changed its depreciation method from the double declining balance method to the straight line method. Samsung based its questionnaire response upon its new depreciation method. However, in changing to the straight line method, Samsung did not adjust its net asset value to reflect the effect of the change. Instead, Samsung simply used the net book value of the asset as of the date of the change in method as the basis for future depreciation. Furthermore, Samsung based future depreciation upon the total useful life of the asset instead of the remaining useful life of the asset at the time of its change in depreciation method. For example, if the method of depreciation was changed for an asset having a five-year useful life after the third year of that asset's life, Samsung would extend the life of the asset by another five years instead of taking depreciation for the last two years of the asset's original useful life. In light of these findings, Commerce concluded that the manner in which Samsung implemented its change in the method of depreciation distorted the amount of depreciation for the period of investigation. The court agrees.

First, Samsung contends that it reported its depreciation expense in a manner consistent with both internal accounting procedures and Korean GAAP. In support, Samsung directs the court to Article 111(2) of Korean GAAP, which provides that "changes in accounting treatments

and accounting estimates should only take effect starting with the year of change." *Confid. Doc. 187,* App. Tab 40. Samsung therefore argues that it complied with Korean GAAP by not restating the value of its assets to reflect the effect of the change in method of depreciation. The court notes that Article 111(2) does not appear to preclude Samsung from adjusting the net book value of an asset when changing the method of depreciation. In any event, assuming Samsung is correct as to this issue, Samsung fails to establish that its decision to use the full useful life of the asset as the basis of depreciation, rather than the remaining useful life at the time of the change in depreciation method, is in accordance with Korean GAAP; indeed, Samsung fails to direct the court to any provision in Korean GAAP which sanctions such a result. Moreover, the court finds that Commerce was entirely justified in concluding that Samsung's methodology, as implemented, distorted depreciation expense during the POI to the extent that Samsung used the full useful life of the asset rather than the remaining useful life at the time of the change in depreciation method. Samsung's hybrid approach takes depreciation expense which should properly be recognized during the POI and shifts it both to previous and subsequent years. *See Defendant's Response Brief* at 21–22. For the foregoing reasons, the court concludes that Commerce properly used BIA in order to adjust Samsung's reported depreciation expense. Accordingly, this aspect of Commerce's *Final Determination* is sustained.

7. *Commerce's Choice of Best Information Available for Calculating Samsung's Depreciation Expenses:*

Micron argues that Commerce's choice of BIA for the calculation of Samsung's depreciation expenses is not in accordance with law. More specifically, Micron asserts that Samsung failed to report that it had altered its depreciation methodology in a manner that distorted the depreciation of its assets. Therefore, according to Micron, Commerce should have adjusted Samsung's depreciation information using information submitted by Micron, rather than relying on the information submitted by Samsung. The court disagrees.

Commerce enjoys discretion in determining what constitutes BIA in a particular case. *Chemical Prods. Corp. v. United States,* 10 CIT 626, 633, 645 F. Supp. 289, 295 (1986). Commerce does not necessarily have to use data supplied by plaintiff as BIA; indeed, Commerce may readily use respondents' data as BIA. *Timken Co. v. United States,* 11 CIT 786, 788–89, 673 F. Supp. 495, 500 (1987); *Chemical Prods.,* 10 CIT at 633, 645 F. Supp. at 295. As long as substantial record evidence supports Commerce's choice of BIA, Commerce's choice will be sustained. *Seattle Marine Fishing Supply Co. v. United States,* 12 CIT 60, 71, 679 F. Supp. 1119, 1128 (1988).

Upon review, the court finds that substantial evidence supports Commerce's decision to use information submitted by Samsung as BIA after Samsung failed to produce requested depreciation information in the requisite form. First, it appears that Commerce verified the information

used in Samsung's calculations. *Confid. Doc. 203* at 2; *Confid. Doc. 228,* Exhibit 2. Second, Commerce adjusted Samsung's figures to account only for depreciation during the period of investigation. *Final Determination,* 58 Fed. Reg. at 15,479–80; *Confid. Doc. 203* at 2. Third, Commerce had reason to believe that the information submitted by Samsung, as adjusted, was more accurate than the information submitted by Micron; specifically, the calculations submitted by Samsung were based on assets used to produce DRAMs, whereas the calculations submitted by Micron were based on all of Samsung's assets. *Confid. Doc. 203* at 2; *Confid. Doc. 228,* Exhibit 2; *Confid. Doc. 186,* Attachment 1. Thus, because substantial evidence supports Commerce's choice of BIA, the court sustains this aspect of Commerce's *Final Determination.*

8. *Commerce's Decision to Deduct U.S. Direct Selling Expenses from Hyundai's Exporter's Sales Price:*

Hyundai argues that Commerce's decision to deduct U.S. direct selling expenses from Hyundai's exporter's sales price ("ESP"), instead of adding such expenses to foreign market value ("FMV"), is contrary to law. This issue has been resolved by the U.S. Court of Appeals for the Federal Circuit ("CAFC"). *Koyo Seiko Co. v. United States,* 12 Fed. Cir. (T) ____, 36 F.3d 1565 (1994). The CAFC has held that neither the plain language of 19 U.S.C. § 1677a(e)(2) (1988) nor its legislative history preclude Commerce from adjusting ESP by deducting all selling expenses, both direct and indirect, incurred in the U.S. market. *Id.,* 36 F.3d at 1573. Finding Commerce's interpretation of the statute to be reasonable, the CAFC has upheld Commerce's decision to adjust ESP to account for U.S. direct selling expenses. *Id.,* 36 F.3d at 1573–75. It is thus settled that Commerce's methodology is in accordance with law. *SKF USA Inc. v. United States,* 19 CIT ____, ____, Slip Op. 95–80 at 14 (May 2, 1995). Accordingly, this aspect of Commerce's *Final Determination* is sustained.

9. *Commerce's Decision to Reclassify Semicon's Capitalized Costs of Facility Construction and Testing:*

Semicon challenges Commerce's decision to reclassify as costs of production certain capitalized costs of facility construction and testing incurred by Semicon. Specifically, during [ ], Semicon began testing [ ]. Semicon deemed commercial production to have begun [ ]. At the same time, Semicon was constructing [ ]. Testing [ ]. Semicon deemed commercial production to have begun [ ]. In accordance with Korean GAAP and internal accounting procedures, Semicon capitalized these construction and testing costs as construction in progress ("CIP") and deferred R&D costs, respectively. Commerce verified Semicon's production quantities and recognized that Semicon capitalized the costs at issue based upon audited financial statements. *Final Determination,* 58 Fed. Reg. at 15,475. Although Commerce traced the costs capitalized as CIP and R&D expenses to company documentation, Commerce dis-

agreed that these costs should be capitalized. *Id.* Commerce stated: "These costs are more appropriately identified as current costs of production because they include the component costs of manufacture, *i.e.*, materials, labor, and overhead, which should be expensed as incurred. Therefore, the Department reclassified the manufacturing costs capitalized as CIP and R&D to current costs of production." *Id.*

Semicon argues that Commerce has failed to establish that Semicon's treatment of the costs at issue pursuant to Korean GAAP is distortional. Commerce contends that "it would be distortive to exclude any manufacturing costs incurred during test production when figuring a per unit cost [ ]." *Confid. Doc. 204* at 1. Commerce further states that "[a]ll costs incurred in trying to perfect and optimize [Semicon's] [ ] are relevant current expenses in determining per unit production costs at time of commercial production (i.e., the point in time [Semicon] feels it has achieved a desired level of efficiency in production)." *Id.* In short, Commerce does not challenge where Semicon drew the line between test production and commercial production; rather, Commerce refuses to acknowledge any distinction between test production and commercial production for purposes of calculating a per unit cost [ ]. Upon review, the court concludes that Commerce erred in refusing to recognize this distinction.

To the extent test production and related construction provide a benefit to current and future production, such costs are properly capitalized and amortized over the periods in which these benefits accrue. *Cf.* part II.1 (finding that Commerce has failed to articulate a reasoned analysis justifying the departure from its established practice of amortizing those R&D expenses related to merchandise under investigation). Indeed, it is Commerce's methodology which distorts costs by allocating all construction, installation, and testing costs to current period production. In sum, Semicon accounted for testing costs as R&D and amortized such costs accordingly. Semicon also accounted for related construction by transferring such costs [ ] and depreciating these amounts over the useful life of the related equipment. Commerce has failed to establish that this treatment, which is in accordance with Korean GAAP and Semicon's internal accounting procedures, significantly distorts costs. The court therefore concludes that Commerce's decision to reclassify as costs of production Semicon's capitalized costs of facility construction and testing is unsupported by substantial evidence and otherwise not in accordance with law.

Furthermore, the court finds that substantial record evidence supports Semicon's determination of when it began commercial production of [ ] DRAMs. Specifically, the court notes that [ ]. In addition, [ ]. The court therefore agrees with Semicon's description of the volume of test production of [ ] DRAMs as being *de minimis*. For all of the foregoing reasons, the court remands this issue to Commerce with instructions that Commerce calculate Semicon's production costs

for [ ] DRAMs without reclassifying as costs of production Semicon's capitalized costs of facility construction and testing.

10. *Commerce's Inclusion of a Small Volume of "Off-Spec" Sales in Its Calculations for Semicon:*

Semicon claims that Commerce has engaged in a longstanding practice of excluding categories of sales from investigations when they involve only a small volume of sales. Semicon further claims that Commerce inexplicably departed from its longstanding practice when it decided to include a small quantity of U.S. sales of "off-spec"[4] DRAMs in the calculation of Semicon's dumping margin. Hence, Semicon argues that Commerce's decision to include off-spec DRAM sales in its calculations is not supported by substantial evidence on the record and is otherwise not in accordance with law. The court disagrees.

In general, Commerce does not exclude any U.S. sales from its calculation of U.S. price ("USP"). *Granular Polytetrafluoroethylene Resin from Japan,* 58 Fed. Reg. 50,343, 50,345 (Sept. 27, 1993) (final results of admin. review). Although Commerce has excluded small quantities of sales from its analysis in some past cases, these cases appear to be exceptional. *See, e.g., Coated Groundwood Paper from Finland,* 56 Fed. Reg. 56,363, 56,365 (Nov. 4, 1991) (final determination); *Gray Portland Cement and Clinker from Japan,* 56 Fed. Reg. 12,156, 12,165 (Mar. 22, 1991) (final determination). These cases do not establish a long standing practice of excluding categories of U.S. sales whenever they involve a small volume of sales.

In this case, substantial evidence supports Commerce's decision to include U.S. sales of off-spec DRAMs in its calculations for Semicon. First, no party disputes that the off-spec DRAMs fall within the scope of Commerce's determination. Second, Semicon sold the off-spec DRAMs in the United States during the period of investigation. *Semicon Sales Verification Exhibit* QV-7. Third, Micron points out that Semicon continues to produce these off-spec DRAMs and to sell them in a well established American market. *Final Determination,* 58 Fed. Reg. at 15,474; *Confid. Doc. 193* at 13–14. Because substantial evidence supports Commerce's decision to include the sales of off-spec DRAMs in the calculation of the dumping margin applicable to Semicon, this aspect of Commerce's *Final Determination* is sustained.

11. *Commerce's Treatment of Semicon's Sales of Product 12:*

Semicon objects to Commerce's treatment of [ ] ("Product 12"). Specifically, Semicon raises three arguments against this aspect of Commerce's *Final Determination,* each of which the court will consider in turn.

First, Semicon challenges Commerce's decision to exclude Product 12 from the home market database after determining that all of Semicon's home market sales of Product 12 were made to a related party at less

[4] Off-spec DRAMs are DRAMs which are not fully functional; nevertheless, these DRAMs have certain limited applications.

than arm's length prices. In order to determine whether home market sales to related parties were made at arm's length, Commerce "compared the gross unit prices of sales to related and unrelated customers." *Final Determination,* 58 Fed. Reg. at 15,469. Because Semicon sold Product 12 only to a related customer in the home market, Commerce could not compare the prices of home market sales of Product 12 to related and unrelated customers. Commerce did, however, determine that Semicon's related customer purchased other DRAM products at less than arm's length prices. Based upon this finding, Commerce decided to exclude *all sales* to that customer, including sales of Product 12, despite the fact that Commerce never specifically determined that Semicon's related party sales of Product 12 were made on a less than arm's length basis. Semicon challenges the reasonableness of Commerce's decision to devise an arm's length test on a per-customer basis instead of a per-product basis.

Commerce enjoys considerable discretion in deciding whether to include related party sales in its calculation of foreign market value ("FMV"). *Usinor Sacilor v. United States,* 18 CIT ____, ____, 872 F. Supp. 1000, 1004 (1994) *("Usinor I").* Applicable regulations provide that Commerce will consider sales between related parties *if it is satisfied* that such sales were made at prices comparable to the prices at which the seller sold such or similar merchandise to unrelated parties. 19 C.F.R. § 353.45(a) (1992). This court will uphold the test that Commerce selects to measure whether sales to related parties were made at arm's length prices, unless that test is shown to be unreasonable. *Usinor I,* 18 CIT at ____, 872 F. Supp. at 1004.

Upon review, the court finds that Semicon has failed to demonstrate that Commerce's customer-based arm's length inquiry is unreasonable. In particular, Semicon has failed to point to any record evidence that tends to show Semicon's sales of Product 12 to its related customer were made at arm's length prices. Semicon also fails to point to record evidence which tends to undermine Commerce's conclusion that Semicon's sales of other products to its related customer were made on a less than arm's length basis. In short, nothing on the record supports Semicon's position that Commerce's methodology mistreats Semicon's sales of Product 12 to its related customer. *Cf. Usinor I,* 18 CIT at ____, 872 F. Supp. at 1004 (holding that Commerce's arm's length test was reasonable given the lack of evidence showing a distortion of price comparability). Accordingly, Commerce's methodology is sustained in this case.

Second, Semicon contends that if sales of Product 12 are to be excluded from the home market database, then U.S. sales of Product 12 should be excluded from the margin calculation as well. Semicon argues that the exclusion of Product 12 resulting from Commerce's arm's length test renders Product 12 a *similar* model not subject to identical home market matching. Semicon's argument is entirely without merit. Commerce was required to determine a dumping margin for all reported U.S. sales. Product 12 was among the reported U.S. sales. The result of

Commerce's arm's length inquiry does nothing to alter Commerce's obligation in this case; it merely casts doubt upon the reliability of the pricing data for an identical product sold in the home market. There is simply no legal support for Semicon's claim for exclusion of U.S. sales of Product 12 from the margin calculation.

Finally, Semicon asserts that even if Commerce correctly included sales of Product 12 in its dumping margin calculation, Commerce should have used price rather than constructed value ("CV") as its basis for comparison of FMV to USP. Citing 19 U.S.C. § 1677b(b) (1988), Semicon argues that Commerce may use CV as FMV *only* when sales are disregarded by virtue of having been made at less than the cost of production. Because Product 12 did not fail the cost test, but was instead excluded on the basis of an arm's length test applied to sales of other products, Semicon argues there was no basis in law for Commerce to have used CV rather than price in determining the FMV for Product 12. The court disagrees.

19 U.S.C. § 1677b(a) (1988) provides that the price of such or similar merchandise shall form the basis for FMV if, *inter alia,* such merchandise is sold in the ordinary course of trade. Commerce's conclusion that home market sales of Product 12 to Semicon's related customer were not at arm's length indicates that such sales were not made in the ordinary course of trade. As a result, Commerce was authorized to turn to CV pursuant to 19 U.S.C. § 1677b(a)(2) (1988); *see also Cemex, S.A. v. United States,* 19 CIT ____,____, Slip Op. 95–72 at 26 (Apr. 24, 1995) (citation omitted) (stating that CV should be used when Commerce has determined that an exporter's home market prices are inadequate or unavailable). Accordingly, Commerce's decision to resort to CV for Product 12 is in accordance with law. For all the foregoing reasons, this aspect of Commerce's *Final Determination* is sustained.

12. *Commerce's Inclusion of Future Generations of DRAMs Within the Scope of Its Investigation:*

Semicon contends that Commerce's decision to include certain future generations of DRAMs within the scope of its determination is contrary to law. More specifically, Semicon claims that it was improper for Commerce to include as yet unidentified DRAMs with densities of greater than 16M within the scope of its determination. According to Semicon, Commerce must wait for DRAMs to come into existence and then apply certain criteria set forth at 19 U.S.C. § 1677j(d)(1) (1988) to determine whether such DRAMs fall into the same class or kind as DRAMs covered by the determination. The court disagrees.

Semicon's argument fails because the statute on which it relies, 19 U.S.C. § 1677j(d)(1) (1988), sets forth criteria for determining whether later developed merchandise falls within the scope of an *outstanding* antidumping or countervailing duty order. Congress specifically intended for this statute to prevent exporters from evading outstanding orders by creating new generations of merchandise. S. Rep. No. 71, 100th Cong., 1st Sess. 101 (1987). Congress did not, however,

intend for the statute to decrease Commerce's authority to make scope decisions. S. Rep. No. 576, 100th Cong., 2nd Sess. 601 (1988).

Commerce enjoys the authority to exercise broad discretion in defining the scope of an antidumping order. *Mitsubishi Elec. Corp. v. United States*, 8 Fed. Cir. (T) 45, 51, 898 F.2d 1577, 1582–83 (1990). Commerce must exercise its discretion in light of all of the facts before it, and in so doing, Commerce must seek to issue an order that will effectuate the purpose of the antidumping laws and remedy the violations found. *Id.* In past cases, Commerce did this by defining the scope of its antidumping orders so as to include future generations of merchandise. *3.5" Microdisks and Coated Media Thereof From Japan*, 54 Fed. Reg. 6433, 6437 (Feb. 10, 1989) (final determination); *Dynamic Random Access Memory Semiconductors of 256 Kilobits and Above From Japan*, 51 Fed. Reg. 9475 (Mar. 19, 1986) (preliminary determination). In one of these cases, Commerce noted that respondents had failed to provide sufficient evidence to indicate that future generations would fall into a different class than existing merchandise. *3.5" Microdisks and Coated Media Thereof From Japan*, 54 Fed. Reg. at 6437.

In this case, the record shows that Commerce exercised its discretion in light of all of the facts before it, and issued an order that seeks to effectuate the purpose of the antidumping laws. First, the record shows that Commerce recognized that future generations of DRAMs would likely retain the fundamental characteristics of existing DRAMs, in that they would be semiconductors with dynamic random access memory. *Confid. Doc. 211* at 3. Second, the record shows that Commerce recognized that new generations of DRAMs typically evolve every three and one-half to four years; hence, an order which failed to cover future generations of DRAMs would soon become meaningless. *Id.* at 3–4. Finally, the record shows that Semicon and other respondents failed to produce evidence indicating that future generations of DRAMs would fall into a different class than existing merchandise.[5] Because substantial evidence supports Commerce's decision to include future generations of DRAMs within the scope of its determination, this aspect of Commerce's *Final Determination* is sustained.

13. *Commerce's Verification of Hyundai's Cost of Production Information:*

Micron argues that Commerce's decision to rely on Hyundai's submitted cost of production information is not supported by substantial evidence or otherwise in accordance with law because Commerce failed to verify adequately the information submitted by Hyundai. In order to prove the inadequacy of Commerce's verification, Micron argues that Hyundai's submitted information cannot be traced to record evidence. The court finds that Micron's argument lacks merit.

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[5] The court notes that Commerce expressly recognized that at such time that respondents believe they have actual evidence indicating that a future generation of DRAMs falls into a different class than existing merchandise, respondents can make a request for exclusion of the new DRAMs from the antidumping order. *Confid. Doc. 211* at 4.

Commerce conducts verification in order to test the information provided by a party for completeness and accuracy. *Bomont Indus. v. United States,* 14 CIT 208, 209, 733 F. Supp. 1507, 1508 (1990). Ordinarily, Commerce does not test every piece of information provided by a party; rather, it conducts spot testing. *Monsanto Co. v. United States,* 12 CIT 937, 944, 698 F. Supp. 275, 281 (1988). As long as Commerce applies a reasonable standard for verifying submitted information, and the results of Commerce's verification are supported by such relevant evidence as a reasonable mind might accept as adequate, the court will not impose its own standard to supersede that of Commerce. *Hercules, Inc. v. United States,* 11 CIT 710, 726, 673 F. Supp. 454, 469 (1987).

Because Hyundai normally maintains its records in a different form than that in which it submitted its cost of production information, Commerce chose to verify Hyundai's submitted information by attempting to tie it to information contained in Hyundai's ordinary business records.[6] *Hyundai Verification Report, Confid. Doc. 175* at 3, 13–14. Indeed, substantial record evidence shows that Commerce successfully tied submitted information to information contained in Hyundai's business records for each major phase of DRAM production, i.e. the wafer fabrication phase; the wafer probe phase; the assembly phase; and the testing phase. *Confid. Doc. 175* at 23, 25, 26–27. In areas in which Commerce could not verify Hyundai's submitted information, Commerce resorted to best information available. *Final Determination,* 58 Fed. Reg. at 15,471 (Comment 1). Upon review, the court finds that Commerce has applied a reasonable standard to verify Hyundai's submitted information, and that substantial evidence supports the results of Commerce's verification. *Cf. Monsanto,* 12 CIT at 944, 698 F. Supp. at 281 (finding that Commerce conducted an adequate verification when it traced selected items from respondents' questionnaire response back through the production process and found that the information provided was accurate).

The fact that Micron cannot completely reenact Commerce's verification of the information submitted by Hyundai does not detract significantly from the substantial record evidence that supports Commerce's verification. *Cf. Usinor Sacilor v. United States,* 19 CIT ____, ___ , Slip Op. 95–94 at 29 n.5 & 76 (May 19, 1995) (holding that the mere presence of conflicting evidence on the record did not so detract from evidence relied upon by Commerce that its determination was rendered unsupported by substantial evidence) *("Usinor II").* Micron's counsel does not enjoy the power to act as an independent investigator, and it should not attempt to duplicate Commerce's efforts. *Bethlehem Steel Corp. v. United States,* 13 CIT 617, 621, 718 F. Supp. 70, 73 (1989) (citations omitted). Indeed, it is not surprising that Micron cannot duplicate Commerce's verification using record documents because not all documents

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[6] More specifically, Commerce discussed Hyundai's accounting system with Hyundai management. *Hyundai Verification Report, Confid. Doc. 175* at 15. Commerce compared Hyundai's accounting system with the methodology employed in Hyundai's COP submission, and it tested the mathematical accuracy of the COP submission. *Id.* Then Commerce attempted to trace information used in the COP submission back to Hyundai's business records. *Id.*

examined at verification are normally made a part of the administrative record. *Kerr-McGee Chem. Corp. v. United States,* 14 CIT 344, 348 n.2, 739 F. Supp. 613, 617 n.2 (1990). As Micron has failed to establish that Commerce's decision to rely on Hyundai's submitted cost of production information is unsupported by substantial evidence or otherwise not in accordance with law, this aspect of Commerce's *Final Determination* is sustained.

14. *Commerce's Verification of Semicon's Cost of Production Information:*

Micron also argues that Commerce erred in relying upon Semicon's submitted cost of production information because Commerce failed to verify adequately Semicon's cost of production response. In order to establish the inadequacy of Commerce's verification, Micron argues that submitted information cannot be traced to record evidence. The court finds that Micron's argument lacks merit.

Commerce chose to verify Semicon's submitted information by tracing it to Semicon's business records. *Confid. Doc. 174* at 30. Indeed, substantial evidence shows that Commerce successfully traced information submitted by Semicon to Semicon's original business records for major cost elements such as materials, labor, overhead, and administrative expenses. *Id.* at 30–36. In areas where Commerce found that Semicon had failed to properly quantify or value costs for its submission, Commerce recalculated or revised Semicon's submitted information. *Final Determination,* 58 Fed. Reg. at 15,471 (Comment 1). Upon review, the court finds that Commerce has applied a reasonable standard to verify Semicon's submitted cost of production information, and that substantial evidence supports the results of Commerce's verification. *See Monsanto,* 12 CIT at 944, 698 F. Supp. at 281.

Micron's inability to trace submitted information back to Semicon's business records does not render Commerce's verification unsupported by substantial evidence. *Cf. Usinor II,* 19 CIT at ____, Slip Op. 95–94 at 29 n.5 & 76. As noted, petitioner's counsel does not enjoy the power to conduct its own verification, and it would be difficult for counsel to do so because not all documents examined at verification are made a part of the record. *Kerr-McGee Chem. Corp.,* 14 CIT at 348 n.2, 739 F. Supp. at 617 n.2; *Bethlehem Steel Corp.,* 13 CIT at 621, 718 F. Supp. at 73. As Micron has failed to establish that Commerce's decision to rely on Semicon's submitted cost of production information is unsupported by substantial evidence or otherwise not in accordance with law, this aspect of Commerce's *Final Determination* is sustained.

15. *Commerce's Determination That Samsung and [ ] Are Not Related Parties:*

Micron argues that Commerce's determination that Samsung and [ ] are not related parties for purposes of determining constructed value is unsupported by substantial evidence on the record and otherwise not in accordance with law. More specifically, Micron asserts that because Samsung and [ ]

are part of the same *chaebol*, or family of companies, they are related parties, as defined by 19 U.S.C. § 1677b(e)(4)(F) (1988). The court disagrees.

In calculating the constructed value of imported merchandise, Commerce can disregard a transaction between certain related parties if the transaction price of any element of value which Commerce must consider fails to fairly reflect the usual market price of that element. 19 U.S.C. § 1677b(e) (1988). The provision at issue, 19 U.S.C. § 1677b(e)(4)(F) (1988), specifies that "related parties" include "[t]wo or more persons directly or indirectly controlling, controlled by, or under common control with, any person." This court has not specified what evidence indicates that two or more persons are controlling, controlled by, or under common control with, any person, for purposes of this statutory provision.[7] In other contexts, however, the court has looked for evidence of relationships defined in financial terms when determining whether two parties control each other. *See Zenith Radio Corp. v. United States*, 9 CIT 110, 114, 606 F. Supp. 695, 699–700 (1985), *aff'd* 4 Fed. Cir. (T) 44, 783 F.2d 184 (1986).[8]

In this case, substantial record evidence supports the conclusion that Samsung and [ ] are not directly or indirectly controlling, controlled by, or under common control with, any person. First, Samsung does not own a significant percentage of the outstanding shares of [ ], or *vice versa*. *Samsung Cost Verification Exhibit* C0724 at 41–42. Second, no member of the Samsung *chaebol* owns a significant percentage of the outstanding shares of both Samsung and [ ]. *Id.* Further, Micron fails to point to any record evidence indicating that the two companies share common officers or directors. Micron does point out that in their financial statements Samsung and [ ] state that they are part of the Samsung group, and that this group includes "numerous companies under common management control." *Pub. Doc. 118* at 8; *Samsung Verification Exhibit* 8D4 at 8. This conflicting evidence does not, however, alter the court's conclusion that substantial record evidence supports Commerce's determination that the two companies are not related for purposes of § 1677b(e)(4)(F). *See, e.g., Matsushita*, 3 Fed. Cir. (T) at 51, 750 F.2d at 933 (1984) (citations omitted) (noting that the possibility of drawing two inconsistent conclusions from record evidence does not prevent an administrative agency's finding from being supported by substantial evidence). For the foregoing reasons, the court sustains this aspect of Commerce's *Final Determination*.

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[7] In one case the court determined that the evidence presented failed to show that two parties were related for purposes of § 1677b(e)(4)(F). *Washington Red Raspberry Comm. v. United States*, 11 CIT 173, 177, 657 F. Supp. 537, 540–41 (1987). That case does not aid in the disposition of this action, however, as the court did not discuss any specific factors in assessing whether the parties were related for purposes of subsection (F).

[8] In *Zenith Radio*, 9 CIT at 114, 606 F. Supp. at 699–700, the court held that Commerce is not required to investigate relationships that do not express themselves in financial terms in order to determine whether two parties in a Japanese *keiretsu* control each other or are under common control for purposes of 19 U.S.C. § 1677(13).

III. CONCLUSION

Upon review, the court finds that the following aspects of Commerce's *Final Determination* are supported by substantial evidence and in accordance with law: (1) Commerce's decision to abandon its COS methodology, and instead to allocate interest expense based upon the ratio of semiconductor fixed assets to company-wide fixed assets; (2) Commerce's incorporation of a time lag when comparing cost of production and constructed value to sales, which was comprised of the time that completed dies were in inventory prior to being input into the assembly process, plus the time required to assemble the dies into finished DRAMs and for testing, plus the average inventory period of finished DRAMs; (3) Commerce's decision to lag costs for short inventory periods; (4) Commerce's decision to include translation losses in its COP calculations; (5) Commerce's determination that Hyundai's translation losses are related to production of the subject merchandise; (6) Commerce's decision to reject Korean GAAP and instead expense all translation losses related to the POI; (7) Commerce's decision to use BIA to adjust Samsung's reported depreciation expense; (8) Commerce's decision to use information submitted by Samsung as BIA after Samsung failed to produce requested depreciation information in the requisite form; (9) Commerce's decision to deduct U.S. direct selling expenses from Hyundai's exporter's sales price; (10) Commerce's decision to include sales of off-spec DRAMs in calculating the dumping margin applicable to Semicon; (11) Commerce's decision to exclude Semicon's sales of Product 12 from the home market database; (12) Commerce's decision to include U.S. sales of Product 12 in its margin calculations for Semicon; (13) Commerce's decision to resort to constructed value as its basis for comparison of FMV to USP with regard to Semicon's sales of Product 12; (14) Commerce's decision to include certain future generations of DRAMs within the scope of its determination; (15) Commerce's decision to rely upon Hyundai's submitted cost of production information; (16) Commerce's decision to rely upon Semicon's submitted cost of production information; and (17) Commerce's determination that Samsung and [ ] are not related parties for purposes of determining constructed value. Accordingly, these aspects of Commerce's *Final Determination* are sustained.

The court also finds that the following aspects of Commerce's *Final Determination* are not supported by substantial evidence on the record and are not otherwise in accordance with law: (1) Commerce's determination that R&D related to non-subject merchandise provided an intrinsic benefit to other semiconductor products, including the subject DRAMs, such that Commerce allocated R&D costs on an aggregate rather than product-specific basis; (2) Commerce's decision to abandon its prior practice of amortizing R&D costs associated with production of the investigated merchandise; (3) Commerce's determination that Korean GAAP does not reasonably account for R&D costs related to the subject DRAMs; (4) Commerce's decision to use surrogate data regard-

ing the semiconductor fixed assets of Samsung and Hyundai, in lieu of requesting actual data; (5) Commerce's decision to employ a [ ] lag for all of Hyundai's sales; (6) Commerce's decision to compare the prices for [ ] units of Hyundai's model HY514400 that were sold in the United States in [ ] with the constructed value of only [ ] units of that model that were produced in [ ]; (7) Commerce's conclusion that the translation losses of Samsung and Semicon are related to production of the subject merchandise; and (8) Commerce's decision to reclassify as costs of production Semicon's capitalized costs of facility construction and testing. Consequently, these aspects of Commerce's *Final Determination* are remanded for reconsideration consistent with this opinion. Finally, the court reserves decision on Hyundai's objections to Commerce's treatment of the alleged error contained in Hyundai's depreciation data, pending the results of remand to Commerce. The court's order shall enter accordingly.

(Slip Op. 95–108)

DAIDO CORP., DAIDO KOGYO CO., LTD., AND ENUMA CHAIN MANUFACTURING CO., LTD., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND AMERICAN CHAIN ASSOCIATION, DEFENDANT-INTERVENOR

Consolidated Court No. 93–06–00311

Defendant-Intervenor American Chain Association challenges Commerce's final dumping margin for Enuma Chain Manufacturing Co., Ltd., as presented in Commerce's final administrative review, *Roller Chain, Other Than Bicycle, From Japan*, 58 Fed. Reg. 30,769 (Dep't Comm. 1993) (final results).

Held: The final results of Commerce's administrative review in *Roller Chain, Other Than Bicycle, From Japan*, 58 Fed. Reg. 30,769 (Dep't Comm. 1993) (final results) is sustained insofar as those results pertain to the claims of American Chain Association. American Chain Association's motion for judgment on the agency record is denied and this action is dismissed.

(Dated June 13, 1995)

Arent Fox Kintner Plotkin & Kahn (Patrick F. O'Leary), for plaintiffs.

Frank W. Hunger, Assistant Attorney General, *David M. Cohen*, Director, Civil Division, Commercial Litigation Branch, United States Department of Justice *(Jeffrey M. Telep), Patrick V. Gallagher, Jr.*, Attorney-Advisor, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of Counsel, for defendant.

Covington & Burling (David R. Grace), David E. McGiffert, for defendant-intervenor.

OPINION

CARMAN, *Judge:* Defendant-Intervenor American Chain Association (ACA) moves for judgment upon the agency record pursuant to Rule 56.2 of this Court. ACA contests the Department of Commerce's (Commerce) calculation of plaintiff Enuma Chain Manufacturing Company Ltd.'s final dumping margin pursuant to Commerce's April 1, 1990, through March 31, 1991, administrative review. *See Roller Chain, Other*

Than Bicycle, From Japan, 58 Fed. Reg. 30,769 (Dep't Comm. 1993) (final results) *(Final Results).*[1] The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(c) (1988).

BACKGROUND

Plaintiffs Enuma Chain Manufacturing Company, Ltd. (Enuma) and Daido Kogyo Company, Ltd. (Daido) are Japanese manufacturers of roller chain. Plaintiff Daido Corporation imports the roller chain Enuma and Daido manufacture. Defendant-Intervenor ACA is a trade association, a majority of whose members manufacture roller chain in the United States.

At ACA's request, Commerce began an administrative review of the outstanding antidumping duty order with respect to plaintiffs Enuma and Daido. *See Roller Chain, Other Than Bicycle, From Japan,* 57 Fed. Reg. 41,471, 41,471 (Dep't Comm. 1992) (prelim. results). The period of review was April 1, 1990, through March 31, 1991. Enuma, however, submitted certain home market sales data corresponding to its June 1, 1990, through May 31, 1991, fiscal year. *See Final Results,* 58 Fed. Reg. at 30,770. Specifically, although Enuma did submit a home market sales listing including all sales made during the period of review, Enuma's home market price adjustments were derived from Enuma's June 1, 1990, through May 31, 1991, fiscal year data rather than from the April 1, 1990, through March 31, 1991, period of review. *Id.*

ACA urged Commerce to reject Enuma's home market response in its entirety and assign Enuma a margin based on the best information available (BIA) because "while Enuma's home market sales listing include[d] all sales within the review period, the deductions and charges [were] based on Enuma's fiscal year and, therefore, include[d] data from sales outside the period of review." *Id.* ACA also requested Commerce treat Enuma as an "uncooperative" party and apply an adverse BIA margin to the final results. *Id.* Furthermore, ACA argued, even if Commerce were "to use Enuma's home market response for the final results, it should assign a value of zero as BIA to all adjustments to Enuma's home market transactions for the months of April and May 1990 because the costs and adjustments associated with such transactions were not included in Enuma's calculation of its claimed adjustments." *Id.*

Commerce rejected ACA's contention that Commerce must reject Enuma's home market response in its entirety. Commerce explained ACA had correctly observed

> that Enuma's home market price adjustments [were] derived from June 1, 1990–May 31, 1991, fiscal year data, rather than from April

[1] In the *Final Results,* Commerce decided not to revoke the antidumping finding on roller chain, other than bicycle, from Japan with respect to Enuma and Daido "[b]ased on [Commerce's] analysis of the comments received, and because of certain privileged information in [Commerce's] possession." *See Final Results,* 58 Fed. Reg. at 30,773–74. Earlier in these proceedings, Commerce requested, and the Court granted, a remand so that Commerce could reconsider its decision not to revoke in light of additional information that existed prior to the publication of the *Final Results. See Daido Corp. v. United States,* 18 CIT ___, ___, 869 F. Supp. 967, 969 (1994). In its remand determination, Commerce again refused to revoke. *See id.* at ___, 869 F. Supp. at 969. This Court upheld Commerce's remand determination. *See id.* at ___, 869 F. Supp. at 973–74.

> 1, 1990–March 31, 1991, review period data, but this does not justify rejection of Enuma's home market response. Enuma's fiscal year differs from the administrative review period by only two months, and all of Enuma's adjustments are calculated using fiscal data allocated to all sales. The adjustments are not specific to sales, models, or even months. The deductions in question are constant costs that generally vary little over time. Given our knowledge of the roller chain industry, we have no evidence from which to conclude that basing the price adjustments in question on fiscal year data rather than review period data would significantly affect the adjustments. In addition, [ACA] has provided no evidence, and we discovered no such evidence during verification, to invalidate this conclusion * * *. [W]e have followed this approach in the past.

Id. (citation omitted). Accordingly, in its calculation of Enuma's margin, Commerce used the fiscal year home market price adjustment data Enuma submitted "as reasonable home market price adjustments." *Id.*

Commerce rejected ACA's other contentions relating to BIA as well. First, Enuma was not "uncooperative," Commerce explained, because Enuma responded to Commerce's questionnaire and all supplemental requests for information. *Id.* Commerce found Enuma's responses were not "substantially inadequate" as ACA alleged, and did not "significantly impede" Commerce's review. *Id.* Second, Commerce disagreed with ACA's contention that Commerce should assign a value of zero as BIA to all adjustments to Enuma's home market transactions in April and May 1990 because the costs and adjustments associated with those transactions were not included in Enuma's calculation of its claimed adjustments. *Id.* Commerce explained that "[a]lthough Enuma's home market price adjustments are derived from fiscal year data * * * Enuma has satisfied its burden of proof and is entitled to the adjustments" based on Commerce's analysis and verification of the information submitted. *Id.* at 30,771.

CONTENTIONS OF THE PARTIES

A. *American Chain Association:*

ACA contends the final dumping margin calculated for Enuma is not supported by substantial evidence on the record and is otherwise not in accordance with law. In so doing, ACA presents three major arguments. First, ACA argues Commerce relied on flawed and incomplete data by using Enuma's substituted home market cost data from outside the period of review. Commerce's purported explanation for use of the substituted data, ACA maintains, "is premised upon the *assumption* that Enuma's home market costs and charges varied 'little over time.'" (ACA's Br. in Supp. of Mot. for J. on Agency R. (ACA's Br.) at 20 (quoting *Final Results*, 58 Fed. Reg. at 30,770).) ACA asserts that Commerce, however, "had no information whatsoever as to cost levels in April and May 1990." *(Id.* (emphasis omitted).) Furthermore, ACA complains, Commerce's knowledge of the roller chain industry provides no justification for use of Enuma's substituted data because "[p]rices, charges,

and other costs vary from producer-to-producer. This is precisely why company-specific margins are calculated." *(Id.* at 21.)

Second, ACA argues that Commerce has a long-standing practice whereby a foreign respondent seeking a favorable fair market value adjustment bears the burden of proof in establishing the claim. Furthermore, "'[t]he law does not permit a party to pick and choose information it wishes to present to the agency.'" *(Id.* at 17 (quoting *Hussey Copper, Ltd. v. United States,* 17 CIT ___, ___, 834 F. Supp. 413, 428 (1993) (citation omitted)) (further citations omitted).) ACA complains that in the present case, although ACA repeatedly requested Commerce seek the missing data and explore the issue at verification, "there is no evidence on the record that [Commerce] ever attempted to determine whether the costs during April and May 1990 were comparable to the fiscal year data reported by Enuma." *(Id.* at 19.) Instead, ACA claims, Commerce relied on Enuma's response and unilateral decision not to submit the requested information to the agency, thereby impermissibly shifting to ACA the burden of proof to invalidate Commerce's reliance on Enuma's data.

Finally, ACA argues Commerce is required to use adverse BIA when a respondent refuses or is unable to produce requested information in a timely manner. The BIA rule currently applied, ACA asserts, is a two-tier test. According to ACA, Commerce has occasionally deviated from the two-tier test, but always in a manner adverse to the noncomplying respondent. Commerce, ACA argues, has no latitude when a respondent refuses or is unable to supply relevant data to Commerce. ACA claims, therefore, that because Enuma did not supply the requested adjustment data for certain home market transactions, Commerce was required to use BIA. In light of the arguments presented, ACA requests this Court remand the *Final Results* to Commerce for a determination of whether Enuma is an "uncooperative" party and with instructions to issue a new final administrative determination in which Enuma is assigned a final margin based on BIA in accordance with Commerce's two-tier approach.[2]

B. *The Department of Commerce:*

Commerce contends its decision to use Enuma's fiscal year expense data to allocate expense adjustments to Enuma's home market sales within the period of review is supported by substantial evidence and is otherwise in accordance with law. Specifically, Commerce argues its reliance on Enuma's questionnaire responses and verified fiscal year expense data in Commerce's allocation of Enuma's expenses and calculation of Enuma's dumping margin was a reasonable exercise of the

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[2] In its motion, ACA also argued that Commerce acted contrary to law when it rejected a request by ACA to "update" information on Enuma and Daido between the end of the last period Commerce reviewed and the publication date of a tentative revocation of the outstanding antidumping duty order. (*See* ACA's Br. at 25–30.) ACA argued that Commerce was required to perform this review before proceeding with revocation. (*See id.* at 30.) ACA informed this Court in a telephone conference that this argument was effectively mooted by the Court's last opinion in this case in which the Court upheld Commerce's determination *not* to revoke. *See supra* note 1. Accordingly, the Court will not address this contention.

agency's discretion. Under the applicable statute and regulations, Commerce reasons, adjustments to foreign market value are made when the party alleging entitlement thereto establishes entitlement to the satisfaction of the administering authority. Here, because Enuma was unable to supply sales-related expenses for April and May 1990, Commerce insists it either had to consider the validity of the fiscal year information supplied or use another proxy for Enuma's expense adjustments. Commerce alleges it reasonably chose the former because the fiscal year information contained no fundamental flaws or discrepancies warranting total rejection, the expenses were constant over time, and, under Commerce's methodology for allocation of expenses, any differences between Enuma's fiscal year and period of review expenses "would have had little or no effect on the calculation of the foreign market value." (Def.'s Mem. in Opp'n at 13–14.)[3] Contrary to ACA's contention that Commerce's determination that Enuma's costs and expenses are constant over time is not supportable because of the missing data, Commerce claims "[t]he expense data from April and May 1990 is irrelevant because, based on Commerce's analysis of all Enuma's financial data, the fiscal year data reflected Enuma's expense experience" during the period of review. *(Id.* at 15.) Commerce alleges this conclusion is not belied by ACA's claim that Commerce may not rely upon its experience with the roller chain industry because producer prices, charges, and costs vary. Commerce responds its "analysis used only Enuma's fiscal data to allocate Enuma's expenses for calculation of Enuma's margin." *(Id.)*

Commerce further argues it reasonably exercised its discretion in deciding not to resort to adverse BIA to calculate Enuma's dumping margin. Commerce explains it accepted as reasonable Enuma's explanation that the company could not provide the information requested within the time Commerce provided. A rejection of Enuma's claims for expense adjustments and an assignment of BIA, Commerce asserts, would have been both inconsistent with the statute and case law and unsupported by the facts. According to Commerce, the BIA rule addresses accuracy and timeliness of factual data. When a respondent cannot provide information, Commerce claims it does not penalize that respondent by resorting to punitive BIA. Here, Commerce argues, the use of the fiscal year expense data as a proxy was reasonable because Enuma did not refuse to cooperate and made its best efforts to supply the requested data in the time allotted. Furthermore, Commerce verified the information as sufficiently reliable for its purposes. Thus, Commerce argues "use of adverse BIA for Enuma's entire response would be

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[3] Commerce explains the methodology used to allocate Enuma's expenses as follows:

> Commerce * * * divided the total inland freight expenses incurred during the fiscal year by the total weight of roller chain shipped in the [period of review]. The resulting coefficient, expressed in yen per kilogram, constituted a ratio of inland freight expense per unit roller chain sold in the [period of review]. The coefficient was then multiplied by the number of kilograms in each shipment to determine the amount of inland freight expense for that shipment. Commerce employed a similar expense allocation for home market packing costs, imputed credit, and imputed inventory carrying costs.

(Def.'s Mem. in Opp'n at 14 (citation omitted).)

inappropriate because Enuma produced cost data to the satisfaction of Commerce." *(Id.* at 20–21.)

C. *Plaintiffs:*

Plaintiffs dispute ACA's contention that Enuma was an uncooperative respondent. According to plaintiffs, Enuma relied on past practice in submitting home market sales and adjustment data from its fiscal year in response to Commerce's questionnaire. (Pls.' Resp. at 8 (citing *Roller Chain Other Than Bicycle From Japan,* 56 Fed. Reg. 23,277, 23,278 (Dep't Comm. 1991) (prelim. results and intent to revoke in part)).) When Enuma subsequently received a letter dated January 29, 1992, from Commerce's Office of Antidumping Compliance requesting period of review home market sales and charges data, Enuma claims it submitted sales data for the entire period of review.[4] Enuma's submission, however, still contained deductions based on Enuma's fiscal year "because there was simply not enough time to revise the deductions and input these onto the computer tape within [Commerce's] deadline." *(Id.* at 10.)

In support of Enuma's actions, plaintiffs argue 19 U.S.C. § 1677e(c) does not speak to that which constitutes an inadequate questionnaire response and, consequently, delegates that determination to Commerce. Additionally, plaintiffs assert, because Commerce concluded the period of review adjustments could be calculated using Enuma's fiscal year data and subsequently properly computed these deductions, "there is a rational connection between the facts and [Commerce's] conclusion not to use adverse BIA for alleged unresponsiveness." *(Id.* at 13 (internal quotations omitted).) Furthermore, plaintiffs assert that the signatory of the letter dated January 29, 1992, is not the "administering authority" to whom 19 U.S.C. § 1677e(c) delegates authority.[5] Plaintiffs argue the administering authority's determination in the *Final Results* that Enuma's submitted data was adequate renders Enuma's alleged partial non-response[6] to the letter irrelevant.

Plaintiffs also dispute ACA's contention that Commerce abused its discretion in computing Enuma's foreign market value adjustments for period of review sales using Enuma's fiscal year data. Plaintiffs argue 19 U.S.C. § 1677b(a) grants the administering authority discretion in computing foreign market value adjustments. Here, plaintiffs argue, Commerce's exercise of that discretion was reasonable. First, plaintiffs assert, the period of review and fiscal year data were out of sync for only two months. Second, plaintiffs argue, "the fact that all adjustments

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[4] Enuma reports it did so after a two-day extension. (*See* Pls.' Resp. at 10.)

[5] According to plaintiffs, the Secretary of Commerce is the administering authority to whom the statute refers. (*See* Pls.' Resp. at 13 n.14.) Plaintiffs state that "[i]n turn, the Secretary of Commerce has subdelegated the responsibilities of the 'administering authority' to the Assistant Secretary for Import Administration." *(Id.* (citations omitted).) The letter dated January 29, 1992, to which plaintiffs refer was signed "Edward Yang, Director, Division I, Office of Antidumping Compliance." (Letter from Edward Yang, Director, Division I, Office of Antidumping Compliance, to Mr. Takachi, Enuma, Daido Corporation (dated Jan. 29, 1992), *reprinted in* Pls.' App. 3, Doc. No. 9.)

[6] Plaintiffs argue the inability to compute separate charges and deductions for the two months out of sync with the period of review was the "only time Enuma did not fully respond" to a request for information from Commerce. (Pls.' Resp. at 12.)

were computed by an allocation of year-long data * * * indicates that any temporary fluctuations or aberrations in the costs will be ironed out." *(Id.* at 18 (footnote omitted).) Third, plaintiffs argue Commerce correctly stated that the "'deductions in question are constant costs that vary little over time.'" *(Id.* (citing *Final Results,* 58 Fed. Reg. at 30,770).) According to plaintiffs, evidence indicates that "use of June 1989–May 1990 fiscal year data would have made little difference in the [foreign market values] for April-May 1990." *(Id.)* Plaintiffs conclude that because Commerce has the discretion to compute adjustments and that discretion was reasonably exercised, the burden shifted to ACA to demonstrate that Commerce abused its discretion. ACA, plaintiffs claim, has not met this burden.

Standard of Review

The appropriate standard for the Court's review of a final determination by Commerce is whether the agency's determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1988). "Substantial evidence is something more than a 'mere scintilla,' and must be enough reasonably to support a conclusion." *Ceramica Regiomontana, S.A. v. United States,* 10 CIT 399, 405, 636 F. Supp. 961, 966 (1986) (citations omitted), *aff'd,* 5 Fed. Cir. (T) 77, 810 F.2d 1137 (1987). "[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n,* 383 U.S. 607, 620 (1966) (citations omitted).

Furthermore, "[a]gency interpretations of statutes which they are charged with administering shall be sustained if permissible, unless Congress has directly spoken to the precise question at issue." *Rhone Poulenc, Inc. v. United States,* 8 Fed. Cir. (T) 61, 67 n.9, 899 F.2d 1185, 1190 n.9 (1990) (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842–45 (1984)); *see U.H.F.C. Co. v. United States,* 9 Fed. Cir. (T) 1, 10, 916 F.2d 689, 698 (1990) ("It is well settled that an agency's interpretation of the statute it has been entrusted by Congress to administer is to be upheld unless it is unreasonable.") (citations omitted).

Discussion

The present case raises the question of Commerce's discretion in determining what constitutes a compliant response to a data request made by Commerce in the course of an antidumping administrative review. To answer this question, the Court first turns to the governing statute and regulation.

Section 1677e(c) of title 19 addresses Commerce's use of BIA. That section reads in full as follows:

> **(c) Determinations to be made on best information available.**
>
> In making their determinations under this subtitle, the administering authority and the Commission shall, whenever a party or any

other person refuses or is unable to produce information requested in a timely manner and in the form required, or otherwise significantly impedes an investigation, use the best information otherwise available.

19 U.S.C. § 1677e(c) (1988). Commerce's regulation governing the use of BIA substantially mirrors the statute. That regulation states in relevant part as follows:

§ 353.37 Best information available.

(a) *Use of best information available.* The Secretary will use the best information available whenever the Secretary:

(1) Does not receive a complete, accurate, and timely response to the Secretary's request for factual information; or

(2) Is unable to verify, within the time specified, the accuracy and completeness of the factual information submitted.

19 C.F.R. § 353.37(a) (1990). This statutory and regulatory language requires Commerce to use BIA under certain circumstances.[7]

However, these circumstances must precede Commerce's resort to BIA. Specifically, 19 U.S.C. § 1677e(c) "clearly requires *noncompliance with an information request* before resort to the best information rule is justified, whether due to refusal or mere inability." *Olympic Adhesives, Inc. v. United States,* 8 Fed. Cir. (T) 69, 79, 899 F.2d 1565, 1574 (1990) (citing as example *Daewoo Elecs. Co. v. United States,* 13 CIT 253, 264–66, 712 F. Supp. 931, 944 (1989), *aff'd in part and rev'd in part,* 11 Fed. Cir. (T) ____, 6 F.3d 1511 (1993))[8]; *Outokumpu Copper Rolled Prods. AB v. United States,* 17 CIT ____, ____, 829 F. Supp. 1371, 1376 (1993) (quoting *Olympic Adhesives,* 8 Fed. Cir. (T) at 79, 899 F.2d at 1574) (further citation omitted). Additionally, the legislative history of section 1677e(c) does not appear to dispel the conclusion that the discretion afforded to Commerce in its administration of the antidumping laws[9] includes Commerce's discretion to determine whether a respondent has complied with an information request. *See* S. Rep. No. 249 at 98; H.R. Rep. No. 317, 96th Cong., 1st Sess. 77 (1979); *cf. Timken Co. v. United States,* 18 CIT ____, ____, 852 F. Supp. 1122, 1125 (1994) ("It is

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[7] This conclusion is supported by legislative history and by case law. *See* S. Rep. No. 249, 96th Cong., 1st Sess. 98 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 484; *Allied-Signal Aerospace Co. v. United States,* 11 Fed. Cir. (T) ____, ____, 996 F.2d 1185, 1189–90 (1993); *Mantex, Inc. v. United States,* 17 CIT ____, ____, 841 F. Supp. 1290, 1309 (1993); *Yamaji Fishing Net Co. v. United States,* 17 CIT ____, ____, 830 F. Supp. 1502, 1508 (1993), *aff'd,* 48 F.3d 1234 (Fed. Cir. 1995) (table) (not cited for precedent).

[8] In *Olympic Adhesives,* the Court of Appeals for the Federal Circuit (CAFC) made its statement in reference to 19 U.S.C. § 1677e(b) (1982). In 1988, section 1677e(b) was redesignated as section 1677e(c). *See Olympic Adhesives,* 8 Fed. Cir. (T) at 69, 899 F.2d at 1567 (citing Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100–418, § 1331(1), 102 Stat. 1107, 1207 (codified as amended at 19 U.S.C. § 1677e)).

[9] The CAFC has recognized the broad discretion generally afforded to the ITA in its administration of the antidumping laws. As the CAFC has observed,

> The Tariff Act of 1930, as amended by the Trade Agreements Act of 1979, establishes an intricate framework for the imposition of antidumping duties in appropriate circumstances. The number of factors involved, complicated by the difficulty in quantification of these factors and the foreign policy repercussions of a dumping determination, makes the enforcement of the antidumping law a difficult and supremely delicate endeavor. The Secretary of Commerce (Secretary) has been entrusted with responsibility for implementing the antidumping law. The Secretary has broad discretion in executing the law.

Smith-Corona Group v. United States, 1 Fed. Cir. (T) 130, 131–32, 713 F.2d 1568, 1571 (1983) (footnotes omitted) (quoted in *Daewoo Elecs. Co., Ltd. v. International Union of Elec., Elec., Technical, Salaried and Mach. Workers,* 11 Fed. Cir. (T) ____, ____, 6 F.3d 1511, 1516 (1993), *cert. denied,* 114 S.Ct. 2672 (1994)), *cert. denied,* 465 U.S. 1022 (1984).

well-established * * * that Commerce has broad discretion with regard to when the use of BIA is appropriate.") (citing *Olympic Adhesives*, 8 Fed. Cir. (T) at 76, 899 F.2d at 1571–72). As long as Commerce stays within the boundaries of the law in the exercise of its discretion, the Court will uphold the agency's action. *See Smith-Corona*, 1 Fed. Cir. (T) at 132, 713 F.2d at 1571 ("While the law does not expressly limit the exercise of [the Secretary's] discretion with precise standards or guidelines, some general standards are apparent and these must be followed. The Secretary cannot, under the mantle of discretion, violate these standards or interpret them out of existence."). Based on the record in the present case, the Court cannot find Commerce's determination is not in accordance with law or unsupported by substantial evidence.

Commerce explains in the *Final Results* that it found Enuma's response compliant. *See Final Results*, 58 Fed. Reg. at 30,770. Although Enuma apparently answered Commerce's letter dated January 19, 1992, with sales adjustment data covering June 1, 1990, to May 31, 1991, the record reveals Commerce was satisfied with Enuma's response and found it fully compliant. *See, e.g., id.* ("Enuma has provided responses to [Commerce's] questionnaire and all supplemental requests for information, none of which have been 'substantially inadequate' * * *."); *id.* at 30,771 ("Although Enuma's home market price adjustments are derived from fiscal year data rather than [period of review] data, Enuma has satisfied its burden of proof and is entitled to the adjustments."). Simply because Commerce may not have informed Enuma explicitly through correspondence that Enuma's response had been accepted as complete prior to issuance of the *Final Results* does not negate Commerce's acceptance of the data.[10] Through Commerce's use of Enuma's data and stated acceptance of that data in the *Final Results*, this Court finds Commerce, in its discretion, deemed Enuma's submission of fiscal year sales adjustment data a compliant response to Commerce's inquiries.[11]

Commerce's determination is supported by substantial evidence and is otherwise in accordance with law. In the *Final Results*, Commerce correctly pointed out that Enuma's fiscal year home market price adjustment data differed from the period of review by only two months. *Id.* at 30,770. Commerce's explanation as to how the adjustments were calculated is particularly persuasive. Commerce explained that "all of Enuma's adjustments are calculated using fiscal data allocated to all sales. The adjustments are not specific to sales, models, or even months." *Id.* Furthermore, despite ACA's contention that Commerce's explanation for the use of Enuma's data "is premised upon the *assumption* that Enuma's home market costs and charges 'varied little over

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[10] The Court notes that ACA and Enuma had the opportunity to submit comments to Commerce regarding Commerce's use of Enuma's data prior to the issuance of the *Final Results*. *See Final Results*, 58 Fed. Reg. at 30,769–71.

[11] The Court's analysis is consistent with a major purpose of BIA—to permit Commerce, and not respondents, to control antidumping investigations. *See Allied-Signal*, 11 Fed. Cir. (T) at ___, 966 F.2d at 1191 ("'[T]he ITA cannot be left merely to the largesse of the parties at their discretion to supply the ITA with information.'") (quoting *Olympic Adhesives*, 8 Fed. Cir. (T) at 76, 899 F.2d at 1571). Commerce could have adjudged Enuma non-compliant and used BIA, but did not.

time,'"[12] the Court observes the *Final Results* indicate Commerce considered all of the data submitted to reach its conclusion. *See id.* at 30,771 ("Enuma has satisfied its burden of proof and is entitled to the adjustments. Enuma is entitled to the adjustments at issue *based on our analysis and verification of the information submitted.")* (emphasis added).

ACA argues that the home market cost data at issue was in Enuma's sole possession, and that Enuma did not submit the data to Commerce notwithstanding ACA's repeated requests Commerce seek the data. ACA urges Commerce's refusal to seek the information from Enuma placed an impermissible burden of proof upon ACA contrary to the policies underlying the applicable statute and regulations. (ACA's Br. at 21–22 (citing *Freeport Minerals Co. v. United States,* 4 Fed. Cir. (T) 16, 20, 776 F.2d 1029, 1033 (1985)).) The Court notes, contrary to ACA's contention, Commerce's actions in the present case did not impermissibly place the burden of proof on ACA in contravention of *Freeport Minerals.* Enuma submitted data that Commerce deemed as compliant and responsive to Commerce's requirements in conducting its investigation in its capacity as the administrative supervisor of the antidumping laws. Based upon all of the circumstances presented in this case as discussed above, this Court holds Commerce's decision to accept Enuma's data as responsive and compliant was reasonable. Furthermore, the Court notes that ACA does not complain of a lack of access to the information upon which Commerce based its decision, or that the information was outdated as it was in *Freeport Minerals.*

The Court observes the instant case is somewhat analogous to *Timken Co. v. United States,* 18 CIT ____, 852 F. Supp. 1122 (1994). In *Timken,* the plaintiff argued the respondents did not provide Commerce with all requested cost of production information, and accordingly, Commerce was required to use BIA in its determination. *Timken,* 18 CIT at ____, 852 F. Supp. at 1125. In response, Judge Tsoucalas of this Court explained the "plaintiff is quite correct that Commerce is required to use BIA under certain circumstances. * * * It is well-established, however, that Commerce has broad discretion with regard to when the use of BIA is appropriate." *Id.* at ____, 852 F. Supp. at 1125 (citing *Olympic Adhesives).* Because it was not clear to the Court, however, "whether Commerce [had] received all the data it requested * * * and, if it did not, whether Commerce [had] deemed the missing data unnecessary," the Court remanded. *Id.* at ____, 852 F. Supp. at 1126. The Court instructed that

> if indeed [respondents] did not completely respond to the request for data without instruction from Commerce to do so, Commerce is required to recalculate [respondents'] dumping margin using the best information otherwise available. If, however, Commerce did receive all the data *or exercise its broad discretion in this matter and*

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[12] (ACA's Br. at 20 (quoting *Final Results,* 58 Fed. Reg. at 30,770).).

deemed the missing information unnecessary, then the dumping margin need not be recalculated.

Id. at ____, 852 F. Supp. at 1126 (emphasis added).

Here however, unlike *Timken*, the *Final Results* clearly indicate Commerce did deem Enuma's response compliant with Commerce's requests for data. *See Final Results*, 58 Fed. Reg. at 30,770. Because Commerce's determination is supported by substantial evidence on the record and is otherwise in accordance with law, no remand is warranted in the instant case.

CONCLUSION

The Court sustains the final results of Commerce's administrative review as presented in *Roller Chain, Other Than Bicycle, From Japan*, 58 Fed. Reg. 30,769 (Dep't Comm. 1993) (final results) as the results pertain to the claims of American Chain Association. The Court denies American Chain Association's motion for judgment on the agency record and dismisses this action.

SCHEDULE OF CONSOLIDATED CASES

American Chain Assoc. v. United States, Court No. 93–06–00355

(Slip Op. 95–109)

DEGUSSA CANADA LTD., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 94–05–00250

Defendant moves, pursuant to Rule 12(b)(5) of the Rules of this Court, for an order dismissing plaintiff's complaint and action on the ground that plaintiff has failed to state a claim upon which relief can be granted.

Held: Defendant's motion is granted and this action is dismissed.

(Dated June 13, 1995)

Barnes, Richardson & Colburn (Rufus E. Jarman, Jr. and *Alan Goggins)* for plaintiff.

Frank W. Hunger, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, United States Department of Justice, *(Carla Garcia-Benitez)*; of counsel: *Stephen Berke*, Office of the Assistant Chief Counsel, United States Customs Service, for defendant.

OPINION

TSOUCALAS, *Judge:* Defendant moves this Court for an Order dismissing plaintiff's complaint and action on the ground that plaintiff has failed to state a claim upon which relief can be granted.

BACKGROUND

Plaintiff, Degussa Canada Ltd., is the importer of record of merchandise consisting of automotive emission catalysts which were entered at

the port of Detroit under cover of nine consumption entries ("the Detroit entries") during the period of February through June, 1990. The United States Customs Service ("Customs") classified the merchandise as other parts and accessories of motor vehicles, under subheading 8708.99, Harmonized Tariff Schedule of the United States ("HTSUS"), dutiable at a rate of 3.1% *ad valorem*.

On July 9, 1990, a Protest and Application for Further Review was filed at the port of Buffalo covering other entries of identical merchandise. Customs liquidated the Detroit entries on July 13, 1990 and August 3, 1990.

Thereafter, on December 17, 1990, plaintiff filed a protest with Customs concerning the liquidations of the Detroit entries. The protest was denied on January 31, 1991. On July 23, 1991, plaintiff commenced a civil action in this Court. That action was dismissed for lack of jurisdiction inasmuch as the protest was filed more than ninety days after liquidation.

On December 16, 1991, a request for reliquidation of the entries involved herein was filed. This request was denied on March 19, 1992. On May 27, 1992, plaintiff filed a protest contesting the denial of its request for reliquidation. That protest was denied on January 12, 1994 and on May 2, 1994 this action was commenced.

DISCUSSION

Upon a motion to dismiss, the Court must decide whether the complaint, with all factual allegations taken as true and construed in the light most favorable to the plaintiff, sets forth facts sufficient to state a legal claim. *See Halperin Shipping Co. v. United States*, 13 CIT 465, 466 (1989). To determine the sufficiency of a claim, consideration is limited to the facts stated on the face of the complaint, in documents appended to the complaint, or incorporated in the complaint by reference. *See Allen v. West Point-Pepperell, Inc.*, 945 F.2d 40, 44 (2d Cir. 1991). Dismissal is proper where it appears beyond doubt that plaintiff can prove no set of facts which would entitle him to relief. *Constant v. Advanced Micro-Devices, Inc.*, 848 F.2d 1560, 1565 (Fed. Cir. 1988) (citing *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957)), *cert. denied*, 488 U.S. 892 (1988).

Plaintiff argues that in liquidating the entries at issue, the Detroit District Director was unaware that an Application for Further Review ("AFR") was pending before Customs Headquarters. Plaintiff claims that this unawareness constituted a mistake of fact, clerical error or other inadvertence on the part of the Detroit District Director. Plaintiff further argues that, through several acts, it brought this mistake of fact on the part of the Detroit District Director to Customs' attention within one year from liquidation sufficiently to permit relief pursuant to § 1520(c) (1988 & Supp. V 1993) and, therefore, all of the required elements for relief under 19 U.S.C. § 1520(c) were present. *Memorandum in Opposition to Defendant's Motion to Dismiss ("Plaintiff's Brief")* at 4–5.

Defendant argues that Congress has enacted a complete system of administration of the Customs laws and specific conditions for judicial review of acts and decisions of the United States Customs Service in the performance of its various duties. *Memorandum in Support of Defendant's Motion to Dismiss ("Defendant's Brief")* at 6. Defendant further argues that under this statutory scheme, the decision of an appropriate Customs official as to classification or liquidation "shall be final and conclusive upon all persons * * * unless a protest is filed in accordance with this section." *Id.* at 7 (quoting 19 U.S.C. § 1514(a) (1988 & Supp. V 1993)). Thus, absent the limited exception discussed below, unless a valid protest is filed within ninety days from the date of liquidation, the liquidation of certain imported merchandise becomes final and conclusive upon all persons. *Id.*

Congress has provided a limited exception to the finality of section 1514 by enacting 19 U.S.C. § 1520(c)(1) (1988 & Supp. V 1993) which states:

> **(c) Reliquidation of entry or reconciliation**
> Notwithstanding a valid protest was not filed, the Customs Service may, in accordance with regulations prescribed by the Secretary, reliquidate an entry or reconciliation to correct—
>
> (1) a clerical error, mistake of fact, or other inadvertence, whether or not resulting from or contained in electronic transmission, not amounting to an error in the construction of a law, adverse to the importer and manifest from the record or established by documentary evidence, in any entry, liquidation, or other customs transaction, when the error, mistake, or inadvertence is brought to the attention of the Customs Service within one year after the date of liquidation or exaction.

Plaintiff argues that the incorrect classification occurred because the Detroit District Director was unaware of certain facts, i.e., that an Application for Further Review with respect to the Buffalo entries was pending before Customs Headquarters. Degussa claims that if the Detroit District Director had been aware of this fact he would have waited for Headquarters to act on the AFR before liquidating the entries. Therefore, the classification of the entries by the Detroit District Director resulted from a clerical error, mistake of fact, or other inadvertence. *Plaintiff's Brief* at 10–15.

It is fundamental that a determination by the Customs Service that the imported merchandise is covered by a particular provision or item of the tariff schedules is a conclusion of law. *See Mattel, Inc. v. United States,* 72 Cust. Ct. 257, 262, C.D. 4547, 377 F. Supp. 955, 960 (1974). Therefore, an erroneous classification of imported merchandise is not remediable as a clerical error, mistake of fact, or inadvertence under section 1520(c)(1).

In this case, notwithstanding some of plaintiff's factual allegations, it is eminently clear that the determination by the Customs Service in Detroit that the imported merchandise was classifiable under the dutiable automobile parts provision in HTSUS 8708.99 is a determination of

law. Consequently, it is equally clear that plaintiff's allegation of a mistake of fact or inadvertence is actually a challenge to the legal conclusion of the Detroit District Director. The fact that a series of other entries covering identical merchandise had been made at the port of Buffalo and that a timely protest with application for further review was filed on these Buffalo entries, and subsequently approved, established that an alleged error was made in the classification of the merchandise and therefore an error in the construction of law.

This Court finds that plaintiff's claim cannot properly be classified as a mistake of fact which would allow plaintiff to avail itself of the application of § 1520(c)(1).

Plaintiff attempts to analogize its situation to the one presented in *C.J. Tower & Sons of Buffalo, Inc. v. United States,* 68 Cust. Ct. 17, C.D. 4327, 336 F. Supp. 1395 (1972), *aff'd,* 61 CCPA 90, C.A.D. 1129, 499 F.2d 1277 (1974), which is a leading case on what constitutes a mistake of fact sufficient to bring to bear application of § 1520(c)(1). In *Tower,* neither the District Director of Customs nor the importer were aware that the merchandise in question was emergency war materials, entitled to duty free treatment under item 832.00, TSUS, until after the liquidation became final. The court held that such a lack of knowledge did not amount to an error in the construction of law but came within the statutory language "mistake of fact or other inadvertence." *C.J. Tower & Sons,* 68 Cust. Ct. at 22, 336 F. Supp. at 1399. However, plaintiff's reliance on *Tower* is misplaced. In *Tower,* the importer and the Customs Service were both unaware of the nature of the goods prior to their liquidation, and for some time thereafter. Based upon the facts known to both the Customs Service and the importer, the goods were subject to duty. The importer was unaware of the ultimate use of his goods and, therefore, could not relate such information to the Customs Service. *Id.* at 22, 336 F. Supp. at 1399.

This Court observes that the *Tower* court considered the character of the merchandise imported as significant, namely, that it was for military department use. The court noted that the applicable free entry provision for government importations must be liberally construed, particularly when the action is brought under § 1520 and if the mistake of fact is the underlying cause for failure to comply with the provision in question. *Id.* at 23, 336 F. Supp. at 1400.

In this action, plaintiff states that the existence of the AFR proceeding was a fact that the Detroit District Director did not know at the time of liquidation and if he had known "he would not, or should not, have liquidated the subject entries when he did." *Plaintiff's Brief* at 11. However, since this fact was not brought to his attention, the Detroit District Director had no means of knowing at the time of liquidation that a further review proceeding was pending.

It is clear from the facts herein and the papers filed in this case, that plaintiff has failed to establish that the alleged error in classification resulted from a clerical error, mistake of fact, or other inadvertence.

This case concerns a challenge to classification, which resulted from an error in the construction of the applicable law.

Customs' erroneous classification resulted from a combination of an error of judgment about the law and a misreading of its applicable provisions. "[A]n error of judgment on the part of [Customs] in making a classification of the merchandise under the wrong tariff [provision] * * * is a mistake in the applicable law." *Fibrous Glass Prods., Inc. v. United States,* 63 Cust. Ct. 62, 64–65, C.D. 3874 (1969), *appeal dismissed mem.,* 57 CCPA 141 (1970).

An importer who believes that Customs has misinterpreted the applicable law and improperly classified his merchandise may file a protest within 90 days after liquidation of the merchandise pursuant to 19 U.S.C. § 1514 (1988 & Supp. V 1993). Section 1520(c)(1) was not intended to serve as "an alternative to the normal liquidation protest method of obtaining review" under § 1514. *See Computime, Inc. v. United States,* 9 CIT 553, 556, 622 F. Supp. 1083, 1085 (1985) (quoting *C.J. Tower,* 68 Cust. Ct. at 21, 336 F. Supp. at 1398)). As plaintiff failed to file a protest within the statutory time period allowed by § 1514, the liquidation of the merchandise is final and conclusive. *See* 19 U.S.C. § 1514(a) (1988). Plaintiff may not seek to rectify Customs' error in the construction of the law under § 1520(c)(1). *See, e.g., Occidental Oil & Gas Co. v. United States,* 13 CIT 244, 246 (1989).

CONCLUSION

Plaintiff has failed to allege sufficient facts to establish that the alleged error in classification resulted from a clerical error, mistake of fact, or other inadvertence by Customs as contemplated by 19 U.S.C. § 1520(c)(1). As the mistake by Customs amounted to an error in the construction of the law, plaintiff has failed to state a claim upon which relief may be granted under § 1520(c)(1). Accordingly, defendant's motion is granted and this action is dismissed.

(Slip Op. 95–110)

VISTA INTERNATIONAL PACKAGING CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 93–02–00074

Plaintiff challenges the U.S. Customs Service's ("Customs") classification of plaintiff's fibrous sausage casings pursuant to HTSUS subheading 3917.10.10.

Held: Plaintiff has overcome the presumption of correctness attached to Customs' classification of the subject merchandise and has demonstrated that fibrous casings are properly classifiable under HTSUS subheading 4823.90.85.

[Judgment for plaintiff.]

(Dated June 14, 1995)

Barnes, Richardson & Colburn (David O. Elliott, Sandra Liss Friedman and *Alan Goggins)* for plaintiff.

Frank W. Hunger, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Carla Garcia-Benitez* and *Mark S. Sochaczewsky)* for defendant.

OPINION

TSOUCALAS, *Judge:* This action comes before the Court after trial *de novo* on October 5, 1994 and filing of parties' post trial briefs. Plaintiff, Vista International Packaging Co. ("Vista"), challenges the United States Customs Service's ("Customs") classification of plaintiff's fibrous sausage casings ("fibrous casings") as artificial guts (sausage casings) of cellulosic plastics materials pursuant to the Harmonized Tariff Schedule of the United States ("HTSUS") subsection 3917.10.10. The Court has jurisdiction pursuant to 28 U.S.C. § 1581(a) (1988).

BACKGROUND

Fibrous casings, the merchandise at issue, are sausage casings imported by Vista. Casings are the vessel into which meats are stuffed to produce sausage and meat products. Fibrous casings are principally used for pepperoni, large size sausage and pre-sliced luncheon meats where cross dimensional stability and uniformity of size are critical. *Plaintiff's Post Trial Brief ("Plaintiff's Brief")* at 7. The casings are composed of two major components, fibrous paper and regenerated cellulose (plastic). Trial Transcript ("TT") at 7.

To manufacture fibrous casings, abaca paper, specially chosen for its strength, is formed into a cylinder. TT at 7, 100, 167. This cylinder is then brought down through a die and viscose is applied onto the surface of the paper. TT at 100, 167. The viscose is allowed to penetrate into the casing which is then put through a "regeneration" or "coagulation" bath, an acid bath that regenerates the cellulose. *Id.* at 100, 167. The casing is then put through a series of baths to clean, desulpher and plasticize it. *Id.* Finally, the casing is stretched, shaped, cut and dried. *Id.* at 169–70. Other ingredients may be added, as well. Glycerine, to plasticize

or soften the casing, can be added to the semi-finished casing. *Id.* at 167. Additives can be put on the casing, either on the outside or inside, to give the casing customer-related characteristics such as peelability or coloring. *Id. See also Defendant's Pretrial Memorandum of Law ("Defendant's Brief")* at 3–5.

On January 9, 1989, Customs issued Headquarters Ruling ("HQ") 082675 which classified fibrous sausage casings as sausage casings of cellulosic plastics materials pursuant to HTSUS subheading 3917.10.10. Plaintiff's Exhibit 3. Because the determination of whether a particular article fits within the meaning of a tariff term is one of fact, this Court may consider plaintiff's claim that fibrous sausage casings are other paper cut to size or shape or other articles of paper and, if appropriate, reject Customs' classification. *See Hasbro Indus., Inc. v. United States,* 879 F.2d 838, 840 (Fed. Cir. 1989).

Customs classified the merchandise at issue pursuant to the following HTSUS heading:

3917	Tubes, pipes and hoses and fittings therefor (for example, joints, elbows, flanges) of plastics:
3917.10	Artificial guts (sausage casings) of hardened protein or of cellulosic plastics materials:
3917.10.10	Of cellulosic plastics materials 6.6%

Plaintiff contends that Customs' classification is incorrect and believes the merchandise should be classified under the following HTSUS heading:

4823	Other paper, paperboard, cellulose wadding and webs of cellulose fibers, cut to size or shape; other articles of paper pulp, paper, paperboard, cellulose wadding or webs of cellulose fibers:
4823.90	Other:
4823.90.85	Other 5.3%

Discussion

The Court notes that, pursuant to 28 U.S.C. § 2639(a)(1) (1988), tariff classifications made by Customs are presumed correct and the burden of proof is upon the party challenging the classification to prove that Customs' classification is incorrect. *See, e.g., Nippon Kogaku (USA), Inc. v. United States,* 69 CCPA 89, 92, 673 F.2d 380, 382 (1982). To determine whether the party challenging Customs' classification has overcome the statutory presumption of correctness, this Court must consider whether "the government's classification is correct, both independently and in comparison with the importer's alternative." *Jarvis Clark Co. v. United States,* 733 F.2d 873, 878 (Fed. Cir. 1984).

Plaintiff argues that, because the viscose or regenerated cellulose component of fibrous casing completely impregnates the paper component and because the casing does not have a coating of plastic which can be removed or measured, the coated paper thickness test of HTSUS Chapter 48, Note 1(f) does not apply. As fibrous casings consist of two major components, Vista maintains the essential character test of

HTSUS General Rule of Interpretation ("GRI") 3(b) should be applied. Plaintiff states the essential characteristic of the casing is its high cross dimensional strength which is attributable to the paper component. Thus, Vista asserts fibrous casings are properly dutiable in accordance with the paper component under HTSUS subheading 4823.90.85. Alternatively, Vista argues that, even if the paper component does not impart the essential character of the casing by itself, it is at least an equal contributor to the essential character. Thus, fibrous casings would be classifiable under the last heading in numerical order, again under HTSUS subheading 4823.90.85. *Plaintiff's Brief* at 15–32.

Defendant asserts that fibrous casings are properly classifiable under HTSUS subheading 3917.10.10 which refers to "artificial guts (sausage casings) * * * of cellulosic plastics materials." Defendant contends the coated paper thickness test of HTSUS Chapter 48, Note 1(f) does indeed apply and precludes classification of the merchandise under HTSUS Chapter 48. Alternatively, pursuant to HTSUS GRI 3(b), defendant argues that subheading 3917.10.10 should be applied in this case because it is the regenerated cellulose which provides most of the desired characteristics sought in fibrous casings (the essential character of the merchandise). *Defendant's Brief* at 7–12.

HTSUS GRI 1 provides that "classification shall be determined according to the terms of the headings and any relative section or chapter notes."

HTSUS heading 3917 provides for "Tubes, pipes and hoses and fittings therefor (for example, joints, elbows, flanges), of plastics." Note 8 to Chapter 39 provides, in pertinent part, that "[f]or purposes of heading 3917, the expression '*tubes, pipes and hoses*' * * * also includes sausage casings." "Plastics" is defined for the tariff schedule in Note 1 of Chapter 39 to include cellulose and its chemical derivatives.

HTSUS heading 4823 provides for other articles of paper. Although it is only persuasive authority, the Court notes that the Explanatory Notes for this heading state that the heading includes sausage casings.

As fibrous sausage casings are composed of paper and plastic, neither heading on its terms covers fibrous sausage casings.

> Note 1(f) of Chapter 48 states:
> 1. This chapter does not cover:
> * * * * * * *
> (f) Paper-reinforced stratified sheeting of plastics, or one layer of paper or paperboard coated or covered with a layer of plastics, the latter constituting more than half the total thickness, or articles of such materials * * *.

For the reasons set out below, this Court finds that the thickness test of Chapter 48 does not apply to fibrous sausage casings.

Note 1(f) is limited to paper coated or layered with plastic. The Court finds, however, that the acaba paper has been permeated or impregnated with plastic to produce fibrous sausage casings. The testimony of the three witnesses with fibrous casing experience was that the paper is

impregnated with plastic, and not merely coated. TT at 19, 38–39, 76, 100, 188. The ruling of the Customs Service, HQ 082675, stated "[The regenerated cellulose] thoroughly permeates the paper." Plaintiff presented U.S. patent literature and marketing brochures from domestic manufacturers which indisputably support the proposition that the paper is impregnated or permeated with plastic and that there is negligible coating involved. *See, e.g.,* Plaintiff's Exhibit 1 at 70, 119.

In addition, plaintiff introduced data regarding the thickness of paper and plastic in the fibrous casings in accordance with Technical Association of the Pulp and Paper Industry of the United States ("TAPPI") internationally recognized standards for measuring the thickness of paper. TT at 55–60. After comparing the thickness of the untreated paper and the thickness of the finished fibrous casing, the data indicated an increase in thickness of approximately 10 to 20 percent. TT at 58. In accordance with TAPPI standards, it is not possible to separately measure the thickness of the plastic and the paper where the paper has been impregnated or permeated with plastic. TT at 60.

Finally, plaintiff introduced scanning electron microscope ("SEM") photographs of fibrous casings cross-sections which showed paper permeated with cellulose and negligible cellulose coating of the paper. TT at 33–36; Plaintiff's Exhibits 5A-5H. Defendant also entered SEM photographs into evidence, but these photographs were largely discredited at trial and the Court does not find them to be adequate representations of fibrous casings. TT at 146–50, 152, 154–55, 193–96; *see* TT at 28–32, 134–35.

As fibrous casings are not precluded from classification under Chapter 48 by the thickness test of Note 1(f), this Court turns to HTSUS GRI 3(b) to reach a decision in this case. HTSUS GRI 3 states, in relevant part:

> 3. When * * * goods are, *prima facie,* classifiable under two or more headings, classification shall be effected as follows:
>
> (a) * * * when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.
>
> (b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

For the reasons set out below, this Court finds that it is the paper component of fibrous sausage casings which gives the casings their "essential character."

High cross dimensional strength is the essential characteristic of fibrous casings. The witnesses with experience in fibrous casings agreed

that it is the high cross dimensional strength which distinguishes them from casings purely of cellulose; which permits hanging, clipping, slicing and packaging in blister packs of the product; and which allows for precise size control and uniformity of diameter of the product even under heavy pressure from stuffing machinery. TT at 42, 63, 99–101, 108, 171, 187. They also agreed that pure cellulose casings do not possess the high cross dimensional strength of fibrous casings and therefore cannot supply the necessary size control and uniformity for the larger diameter products, such as pepperoni, bologna and presliced packaged luncheon meats that are exclusively produced using fibrous casings. TT at 41, 62, 98–100, 108, 187.

Plaintiff introduced examples of pepperoni and large diameter bologna products, stuffed both into pure cellulose casings and into fibrous casings, which confirmed the above-mentioned testimony. Plaintiff's Exhibits 8A-8F. The pure cellulose casing exhibits were misshapen or had split open and the fibrous casing exhibits were uniform in diameter and could be clipped. *Id.* Thus, the evidence introduced at trial indicated that high cross dimensional strength is the essential characteristic of fibrous casings.

This Court finds that it is the paper component which imparts high cross dimensional strength to fibrous sausage casings. The witnesses with fibrous casing experience all agreed that the paper component supplies cross dimensional strength to fibrous casings. TT at 51–52, 77–78, 111, 172, 187. Pure cellulose casings stretch like balloons because they lack this strength and rigidity which the paper imparts to fibrous casings. TT at 99, 172, 187. Further, it is the width of the paper which determines the width of the fibrous casing. TT at 189.

In light of these findings, defendant's contention that fibrous sausage casings are artificial guts (sausage casings) of cellulosic plastics materials pursuant to HTSUS subheading 3917.10.10 is without merit. This Court therefore finds that fibrous casings are paper and paperboard, and articles of paper pulp, of paper or of paperboard, pursuant to HTSUS subheading 4823.90.85.

CONCLUSION

For the foregoing reasons, this Court finds that plaintiff has overcome the presumption of correctness attached to Customs' classification of the subject merchandise under subheading 3917.10.10 of the HTSUS and has demonstrated that fibrous sausage casings are properly classifiable under subheading 4823.90.85 of the HTSUS. Customs is hereby ordered to reliquidate the subject merchandise under subheading 4823.90.85 and to refund all excess duties with interest as provided by law.

(Slip Op. 95–111)

KOYO SEIKO CO., LTD. AND KOYO CORP. OF U.S.A., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND TIMKEN CO., DEFENDANT-INTERVENOR

Court No. 90–06–00300

NSK LTD. AND NSK CORP., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND TIMKEN CO., DEFENDANT-INTERVENOR

Court No. 90–06–00309

Plaintiff and defendant-intervenor contest certain aspects of the Department of Commerce, International Trade Administration's ("Commerce") redetermination on remand filed pursuant to *Koyo Seiko Co. v. United States and NSK Ltd. v. United States*, 18 CIT ___, Slip Op. 94–75 (May 10, 1994).

Held: This case is remanded to Commerce to correct the two computer programming errors identified by The Timken Company ("Timken"). Upon correction of these two computer programming errors, Commerce's Redetermination on Remand is affirmed in all respects.

[Case remanded to Commerce to correct the two programming errors, case affirmed in all respects; case dismissed.]

(Dated June 15, 1995)

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Donohue and Donohue, (Joseph F. Donohue, Jr. and *Kathleen C. Inguaggiato)* for plaintiffs NSK Ltd. and NSK Corporation.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Velta A. Melnbrencis,* Assistant Director); of counsel: *Joan L. MacKenzie,* Attorney-Advisor, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for defendant.

Stewart and Stewart (Terence P. Stewart, James R. Cannon, Jr. and *John M. Breen)* for defendant-intervenor The Timken Company.

OPINION

TSOUCALAS, *Judge:* Plaintiffs Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A., Inc. and defendant-intervenor The Timken Company ("Timken") contest certain aspects of the Department of Commerce, International Trade Administration's ("Commerce"), redetermination on remand concerning *Tapered Roller Bearings Four Inches or Less in Outside Diameter From Japan; Final Results of Antidumping Duty Administrative Review ("Final Results")*, 55 Fed. Reg. 22,369 (1990). These Final Results cover the period from April 1, 1974 through July 31, 1980.

On May 10, 1994, the Court remanded, in part, the Final Results on tapered roller bearings ("TRBs") made in Japan by Koyo Seiko Co., Ltd. and distributed by its subsidiary, Koyo Corporation of U.S.A., Inc. (collectively "Koyo"), and by NSK Ltd., and distributed by its subsidiary, NSK Corporation (collectively "NSK"). *See Koyo Seiko Co. v. United States and NSK Ltd. v. United States*, 18 CIT ___, Slip Op. 94–75 (May 10, 1994) *("Koyo/NSK")*. In *Koyo/NSK*, the Court ordered Commerce to redetermine the final dumping margins for entries made by Koyo

between 1974–1977 and by NSK between 1974–1978, based on the complete record of Commerce's administrative review and on the Court's prior rulings in Court Nos. 90–0600300 and 90–06–00309 and in the related case, *Timken Co. v. United States,* 16 CIT 429, 795 F. Supp. 438 (1992) *("Timken").* The Court's order was issued pursuant to a mandate, dated April 18, 1994, from the United States Court of Appeals for the Federal Circuit (CAFC).

BACKGROUND

Prior to the CAFC's order, there had been four Court remands concerning these Final Results. In *Koyo Seiko Co. v. United States ("Koyo I"),* 16 CIT 366, 796 F. Supp. 517 (1992), *aff'd in part and rev'd in part,* 20 F.3d 1160 (Fed. Cir. 1994), and *NSK Ltd. v. United States ("NSK"),* 16 CIT 401, 794 F. Supp. 1156 (1992), *rev'd in part,* 20 F.3d at 1160, the Court instructed Commerce to (1) liquidate entries made by Koyo between April 1, 1974 and September 30, 1977, and entries made by NSK between May 1, 1974 and March 31, 1978, according to master lists which had been issued prior to the date that jurisdiction over these proceedings was transferred from the Department of the Treasury ("Treasury") to Commerce; (2) recalculate margins for entries not covered by master lists which were entered between October 1, 1977 and March 31, 1979 for Koyo, and between April 1 to April 30, 1974 and April 1, 1978 to July 31, 1980 for NSK according to the three-criteria methodology for determining "such or similar" merchandise; (3) recalculate dumping duties for entries made by Koyo between April 1, 1978 through March 31, 1979, without reference to the investigation of sales at prices below the cost of production ("COP"); (4) apply the twenty percent cost cap at the end rather than at the beginning of the model match selection process; (5) include Koyo's data for net weights of certain TRBs in the calculation of U.S. Customs duties; and (6) add only 30 days to Koyo's shipping time when calculating an adjustment for U.S. inventory expenses. The CAFC reversed the Court on the master list issue and affirmed the Court regarding incorporation of Commerce's COP investigation findings with respect to Koyo's 1978–1979 TRB entries. *See Koyo Seiko Co. v. United States,* 20 F.3d at 1160.

In determining the remanded results pursuant to *NSK,* 16 CIT at 401, 794 F. Supp. at 1156, Commerce discovered and corrected a clerical computer programming error that prevented sales of NSK's U.S. cups and cones from being compared with sales of home market split sets. NSK contested this correction; however, the Court found that Commerce had acted properly and affirmed Commerce's redetermination pursuant to remand. *See Koyo Seiko Co. v. United States,* 17 CIT ____, 819 F. Supp. 1093 (1993), *aff'd in part and rev'd in part on other grounds,* 20 F.3d at 1160.

In *Timken,* 16 CIT at 429, 795 F. Supp. at 438, the Court again remanded the Final Results to Commerce to (1) use Koyo's verified per-unit export department expenses as best information available ("BIA") when calculating the exporter's sales price ("ESP") adjustment for export sel-

ling expenses; (2) apply the twenty percent cap on cost differences in accordance with *Koyo*, 16 CIT at 366, 796 F. Supp. at 517; and (3) eliminate application of the provisional assessment cap contained in 19 U.S.C. § 1673f(a) (1988), with respect to entries made by Koyo between June 5, 1974 to January 29, 1975 which were secured by bonds rather than by cash deposits.

In *Koyo I*, 16 CIT at 366, 796 F. Supp. at 527–31, the Court modified its judgment to allow Timken to supplement its allegation regarding below COP sales and to allow Commerce to consider this supplemental information in determining whether the dumping margins for the April 1, 1978 to March 31, 1979 period should be recalculated with reference to the investigation of below-cost-of-production sales. Subsequently, Commerce found sales below the cost of production and calculated new margins for Koyo.

Commerce submitted its remand results for NSK pursuant to *NSK* and *Timken* in August 1992, and for Koyo pursuant to *Koyo, Timken* and *Koyo I* in October 1992. The Court affirmed these results in their entirety. *See Koyo Seiko Co.*, 17 CIT at ___, 819 F. Supp. at 1093. Timken appealed. The CAFC affirmed the Court's decision in part and reversed in part. *See Koyo Seiko Co.*, 20 F.3d at 1160. Specifically, the CAFC (1) upheld the Court's affirmance of Commerce's incorporation of its COP investigation into the final results for Koyo's 1978–1979 TRB entries; (2) reversed the Court's decision to allow liquidation of Koyo's 1974–1977 and NSK's 1974–1978 TRB entries according to pre-existing Treasury master lists; and (3) remanded the Koyo/NSK cases for a redetermination of the final dumping margins for Koyo's 1974–1977 and NSK's 1974–1978 TRB entries. *Koyo Seiko Co.*, 20 F.3d at 1164–68.

Redeterminations:

On July 18, 1994, Commerce filed with this Court its Final Results of Redetermination Pursuant to Court Remand, *Koyo/NSK*, 18 CIT at ___, Slip Op. 94–75 *("Redetermination on Remand")*. In redetermining margins for Koyo and NSK, Commerce employed the methodology used in the administrative review with the modifications previously ordered by the Court, to wit:

A. *Recalculation of Antidumping Duties Using the Three-Criteria Methodology:*

In *Koyo* and *NSK*, the Court had ordered Commerce to conduct model-match analyses for entries made by Koyo between October 1, 1977 through March 31, 1979, and by NSK between April 1, 1978 and July 31, 1979—using the three-criteria methodology in effect before 1987. These three criteria are: (1) outer diameter, (2) inner diameter, and (3) basic load rating. In the review, Commerce had used five criteria for the model match analysis. These criteria were comprised of the above-enumerated criteria plus "width" and "Y2" factor. For these remand results, Commerce recalculated the antidumping duty margins by comparing the sum of the values of the above-enumerated three physical criteria of commercially similar U.S. and home market models for Koyo's entries

made between April 1, 1974 and September 30, 1977, and for NSK's entries made between June 6, 1974 and March 31, 1978, the entries which were covered by Treasury master lists. *Redetermination on Remand* at 6.

B. *Recalculation of Antidumping Duties by Applying the Twenty-Percent Cost "Cap" Before the Three-Criteria Model Selection Process:*

As noted, Commerce, in the original review, had employed a five-criteria analysis to select the ten most similar home market models. Commerce had then compared the difference-in-merchandise costs, when available, of the U.S. model with the home market models to determine whether the home market models were of approximately equal commercial value to the U.S. model. If the differences in costs between the U.S. and the home market models exceeded 20%, Commerce determined that the home market model was not equal to the U.S. model in commercial value. Commerce then used constructed value as the basis of foreign market value ("FMV"), rather than comparing the U.S. model to the next most similar home market model based on the above noted criteria. *Id.* at 6–7.

Commerce had requested a remand to conduct the 20% difference-in-merchandise test prior to selecting similar home market models based on the three criteria enumerated above. The Court remanded the issue in *Koyo* and *NSK*. Consistent with its remand results in *Koyo* and *NSK*, in these remand results, Commerce first applied the 20% difference-in-merchandise cost test to determine if U.S. and home market models were of approximately equal commercial value. Commerce selected the ten most physically similar home market models by applying the three-criteria model match methodology to these models of approximately equal commercial value. *Id.* at 7.

C. *Recalculation of Dumping Duties for Koyo's 1978–1979 Entries Without Regard to the Investigation of Sales at Prices Below the Cost of Production:*

Although *Koyo I* allowed an examination of sales made below the cost of production by Koyo, that case concerned only the 1978–1979 period. Therefore, for these remand results, Commerce did not conduct a below-cost investigation for the 1974–1977 period. *Id.* at 8.

D. *Use of Information Koyo Submitted for TRB Weights for Calculation of U.S. Customs Duties:*

In *Koyo,* the Court instructed Commerce to use information submitted by Koyo concerning unit weights in calculating U.S. Customs duties for the period October 1, 1977 through March 31, 1979. Consistent with its results in *Koyo,* for these remand results covering April 1974 through September 1977, Commerce used Koyo's unit weight data submitted prior to the preliminary results and multiplied it by the U.S. Customs duty rate to determine the exporter's sales price ("ESP") adjustment for Customs duties for Koyo's entries made between April 1, 1974 and September 30, 1977. *Id.*

E. *Use of Verified Information for Calculation of Adjustment for U.S. Inventory Expenses:*

In *Koyo,* the Court ordered Commerce to add 30 days, the verified time of shipment from Japan, to the number of days in inventory, rather than adding the 45 days which Koyo had reported. Consistent with the remand results in *Koyo,* for these remand results, Commerce used the verified 30-days shipping period to determine time and expenses associated with maintaining the TRBs in inventory. *Id.* at 8–9.

F. *Export Department Expenses Adjustment to Exporter's Sales Price:*

In *Timken,* the Court ordered Commerce to use the verified per-unit export department expenses as BIA when calculating the ESP adjustment for Koyo's export selling expenses. The verified expense figure was a ratio of the percent of the cost, insurance and freight ("CIF") value of all exported goods. In the Final Results, Commerce had used a ratio which was based on a comparison of the export department's expenses attributable to U.S. exports with the CIF value of all U.S. exports. Consistent with its remand results in *Timken,* for these remand results, Commerce used the verified ratio. *Id.* at 9.

G. *Antidumping Duty Assessment Cap:*

In *Timken,* Commerce agreed with Timken that the provisional assessment cap did not apply to certain entries subject to bonds during the period of review. In accordance with the Court's orders in *Timken,* it is Commerce's intention to instruct the United States Customs Service ("Customs") to liquidate bond-secured entries made between June 6, 1974 (the date that Treasury published an affirmative determination of sales at less than fair value ("LTFV")) and January 29, 1975 (the date of the International Trade Commission (the "ITC") published its final affirmative material injury determination), and to collect final assessments of antidumping duties without regard to the provisional duty assessment cap contained in section 737 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1673f(a). *Redetermination on Remand* at 9–10.

As in the administrative review, in these redetermined results, Commerce used the rate calculated for NSK for 1976–1977 as the BIA rate for the 1974–1976 period. Commerce determined the following antidumping margins for Koyo and NSK:[1]

Koyo:	04–01–1974 to 07–31–1976	11.89%
	08–01–1976 to 09–30–1977	4.78%
NSK:	06–06–1974 to 06–30–1976	17.42%
	07–01–1976 to 07–31–1977	17.42%
	08–01–1977 to 03–31–1978	18.63%

Id. at 10.

Commerce informs the Court that if its redetermination results are approved, it will instruct Customs to assess antidumping duties on entries made from April 1, 1974 through September 30, 1977 for Koyo

[1] NSK poses no objections to Commerce's July 18, 1994 Results of Redetermination. *Comments of NSK Ltd. and NSK Corporation to the Results of Redetermination.*

and on entries made from June 6, 1974 through March 31, 1978 for NSK. Commerce will also issue assessment instructions for entries, unchallenged in these actions, which were affirmed by the Court for Koyo regarding entries made from October 1, 1977 through March 31, 1979, and for NSK regarding entries made from April 1, 1978 through July 31, 1980. Commerce will issue appraisement instructions directly to Customs. *Id.* at 11.

DISCUSSION

Commerce's final results filed pursuant to a remand will be sustained unless that determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1988). Substantial evidence is such "relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938); *Alhambra Foundry Co. v. United States,* 12 CIT 343, 345, 685 F. Supp. 1252, 1255 (1988).

1. *Antidumping Duty Assessment Cap:*

Koyo protests Commerce's intention to disregard the duty assessment cap requirement of 19 U.S.C. § 1673f(a)[2] when instructing Customs to liquidate entries made by Koyo between June 6, 1974 and January 29, 1975. *Comments of Plaintiffs Koyo Seiko Co. Ltd. and Koyo Corporation of U.S.A. on Results of Redetermination Pursuant to Court Remand ("Koyo's Brief")* at 2. Koyo notes that in *Timken Co.,* 16 CIT at 438–40, 795 F. Supp. at 446–47,[3] the Court held that the provisional assessment cap is inapplicable where bonds instead of cash deposits are posted as security for estimated duties. Koyo argues, however, that *Timken* is no longer controlling and urges the Court to follow the decision of the CAFC in *Daewoo Elecs. Co. v. United States,* 6 F.3d 1511, 1523 (Fed. Cir. 1993), which held that § 1673f(a) applies equally to entries secured by cash deposits and bonds. *Koyo's Brief* at 2. In addition, it is Koyo's position that the Court has found that its 1974–1975 entries are subject to a bond rate of zero percent to cover estimated dumping duties. *Id.* at

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[2] 19 U.S.C. § 1673f(a) provides:

§ 1673f. Treatment of difference between deposit of estimated antidumping duty and final assessed duty under antidumping duty order.

(a) Deposit of estimated antidumping duty under section 1673b(d)(2) of this title

If the amount of a cash deposit collected as security for an estimated antidumping duty under section 1673b(d)(2) of this title is different from the amount of the antidumping duty determined under an antidumping duty order published under section 1673e of this title, then the difference for entries of merchandise entered, or withdrawn from warehouse, for consumption before notice of the affirmative determination of the Commission under section 1673d(b) of this title is published shall be—

(1) disregarded, to the extent the cash deposit collected is lower than the duty under the order, or
(2) refunded, to the extent the cash deposit is higher than the duty under the order.

19 U.S.C. § 1673b(d)(2) (1988) provides in pertinent part:

(d) Effect of determination by the administering authority

If the preliminary determination of the administering authority under subsection (b) of this section is affirmative, the administering authority—

* * * * * * *

(2) shall order the posting of a cash deposit, bond, or other security, as it deems appropriate, for each entry of the merchandise concerned equal to the estimated average amount by which the foreign market value exceeds the United States price.

[3] In *Timken Co.,* 16 CIT at 438–40, 795 F. Supp. at 446–47, the Court followed *Zenith Elecs. Corp. v. United States,* 15 CIT 394, 397–400, 770 F. Supp. 648, 652–54 (1991).

3–5 (citing *Koyo*, 16 CIT at 366, 796 F. Supp. at 521). Koyo requests that the Court order these entries liquidated at their "as entered" zero percent assessment rate. *Id.* at 3–5, 9.

Commerce argues that Koyo fully and actively participated in *Timken* and did not appeal the Court's adverse ruling that bonds of the type posed by Koyo in the underlying proceeding did not cap its antidumping duty liability. Commerce contends, therefore, that the Court's judgment in *Timken* has become final and conclusive as to Koyo. *Defendant's Response to the Comments Filed by Plaintiffs and the Intervenor with Respect to the Redetermination Pursuant to Court Order ("Commerce's Brief")* at 6–7. Commerce further contends that the entries at issue are governed by the Antidumping Act of 1921 (the "1921 Act") and under that applicable law, Koyo was not required to, and did not, deposit any estimated duties or post any bonds in lieu of cash as security for estimated antidumping duties pursuant to any affirmative preliminary determination. *Commerce's Brief* at 10. Commerce points out that § 1673f(a), the provisional assessment cap, and § 1673b(d)(2), which provides for the posting of cash deposits, bonds, or other security, are intended to operate together and both provisions post-date Koyo's entries. *Id.* at 7–10. Commerce asserts that the Court has agreed with its statutory interpretation that the substantive provisions of the 1921 Act apply to pre-1980 entries. *Id.* at 10–11. Alternatively, Commerce contends that Customs requested Koyo to post bonds to cover a weighted-average margin of seventeen percent during the investigation. *Id.* at 11.

Timken contends that the doctrine of *res judicata* bars Koyo from re-arguing the assessment cap issue post-*Timken*. *Rebuttal of the Timken Company to Koyo Comments Regarding Remand Determination* at 4. In rebuttal, Koyo asserts that *Timken* is part of the law of this case and, in light of the CAFC's contrary finding on this issue in *Daewoo*, the Court may reconsider its *Timken* decision under the "law of the case" doctrine. *Reply Comments of Plaintiffs Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A. on Results of Redetermination Pursuant to Court Remand ("Koyo's Reply")* at 3–8.

In remanding this case to Commerce in *Koyo/NSK*, 18 CIT at ___, Slip Op. 94–75, the Court specifically instructed Commerce to redetermine the final dumping margins of Koyo's 1974–1977 TRB entries based on the complete record of the administrative review conducted and on the Court's prior rulings in this case and in the related *Timken* case, 16 CIT at 429, 795 F. Supp. at 438. The phrase "law of the case" expresses the practice of courts generally to "refuse to reopen what has been decided." *Messenger v. Anderson*, 225 U.S. 436, 444 (1912). Under this doctrine, a court will generally not reopen an issue already decided unless (1) the evidence in a subsequent trial was substantially different, (2) controlling authority has since made a contrary decision of law applicable to such issues, or (3) the decision was clearly erroneous and would work a substantial injustice. *Kori Corp. v. Wilco Marsh Buggies and Draglines, Inc.*, 761 F.2d 649, 657 (Fed. Cir.) (citation omitted), *cert.*

denied, 474 U.S. 902 (1985). Because of the manner in which the Court has handled these related cases and in order to clarify the Court's position on the assessment cap issue, the Court will consider the merits of Koyo's argument under the second exception of the law of the case doctrine.

In *Timken,* the Court held that the assessment cap contained in 19 U.S.C. § 1678f(a) does not apply in the absence of cash deposits of estimated duties. *Timken,* 16 CIT at 429, 795 F. Supp. at 447. *Timken* concerned Koyo's entries made between June 5, 1974 (the date that Treasury published its affirmative determination of sales at LTFV and withholding of appraisement notice) to January 29, 1975 (the date that the International Trade Commission published its affirmative injury determination). *Id.* at 429, 795 F. Supp. at 447 (citing *Tapered Roller Bearings From Japan. Antidumping; Withholding of Appraisement Notice,* 39 Fed. Reg. 19,969 (1974); *Tapered Roller Bearings and Certain Components Thereof From Japan. Determination of Likelihood of Injury,* 40 Fed. Reg. 4,366 (1975)). In *Timken,* the Court observed that the applicable law at the time of Koyo's entries was the Antidumping Act of 1921[4] which did not provide for the calculation of estimated dumping duties or for the application of a provisional assessment cap and, consequently, Koyo had not had to deposit cash to cover estimated duties. *Id.* at 439, 795 F. Supp. at 447.

Subsequent to the Court's *Timken* decision, the CAFC rendered its finding that a cap applies to antidumping duties irrespective of whether a bond or cash deposit was posted as security. *Daewoo Elecs. Co.,* 6 F.3d at 1523. However, *Daewoo* can be distinguished on the facts from this case. Therefore, the *Daewoo* decision does not change the Court's ultimate decision in this case concerning the specific entries at issue. *Daewoo* concerned entries made between October 19, 1983 and April 30, 1984. *Id.* at 1512. The applicable law at the time those entries were made was the Trade Agreements Act of 1979 ("the 1979 amendments"). The 1979 amendments came into effect on January 1, 1980 and instituted, for the first time, an assessment cap. *See* 19 U.S.C. § 1673f(a). The *Daewoo* entries were also subject to the bonding requirement of 19 U.S.C. § 1673b(d)(2). Therefore, *Daewoo* addressed post-1980 entries in relation to the current antidumping duty law.

In contrast, the entries in the case at bar were made between June 5, 1974 and January 29, 1975. The applicable law during that time period was the 1921 Act. The 1921 Act made no provision for the calculation of estimated antidumping duties and did not require the posting of cash deposits or bonds as security for estimated duties. As Koyo's entries predated the effective date of the assessment cap provision, they are governed by the 1921 Act.

Further, Commerce has frequently announced that the 1921 Act applies to unliquidated pre-1980 entries. *See, e.g., Tapered Roller Bear-*

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[4] Antidumping Act of 1921, 42 Stat. 11, *repealed by* Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 (codified as amended in scattered sections of 19 U.S.C.).

ings and Certain Components Thereof From Japan; Preliminary Results of Antidumping Finding, Tentative Determination to Revoke in Part, and Intent to Revoke in Part, 49 Fed. Reg. 20,354, 20,355 (1984); *Tapered Roller Bearings and Certain Components Thereof From Japan; Final Results of Administrative Review of Antidumping Finding,* 49 Fed. Reg. 8,976 (1984); *Calcium Pantothenate From Japan; Preliminary Results of Administrative Review of Antidumping Finding,* 47 Fed. Reg. 7,476–77 (1982); and *Tapered Roller Bearings and Certain Components Thereof From Japan; Preliminary Results of Administrative Review of Antidumping Finding; NTN Toyo Bearing Co., Ltd. and NTN Bearing Corporation of America; and Tentative Determination to Revoke in Part,* 46 Fed. Reg. 14,371 (1981) (stating that the substantive provisions of the 1921 Act apply to all unliquidated entries made prior to 1980). The Court has previously recognized that the substantive provisions of the 1921 Act apply to unliquidated entries made prior to 1980. *See Timken Co.,* 10 CIT 86, 96 n.5, 110, 630 F. Supp. 1327, 1336 n.5, 1347 (1986).

Moreover, Koyo does not point to any support in the statute or its legislative history that would support its position that the assessment cap applies to pre-1980 entries.

In addition, while the Court makes reference to a "zero assessment rate" for Koyo in *Koyo I,* 16 CIT at 370, 796 F. Supp. at 521, it made no finding with respect to the applicable bond rate to cover estimated duties on the subject entries. Moreover, Koyo has not established that the entries at issue should be liquidated at zero antidumping duties. The record shows that on September 14, 1977, Treasury issued CIE No. 526/73, Supplement No. 6, which referred to a prior CIE dated June 18, 1974. P.R. Document No. 37. The referenced CIE notes that Supplement No. 1 "caused appraisement to be withheld on the subject merchandise and informed Customs import specialists of a weighted-average margin of seventeen percent that the investigation had uncovered on imports of the subject merchandise."[5] *Id.* Moreover, correspondence by Koyo's own counsel to Customs, dated January 31, 1978, makes reference to this seventeen percent bond rate. P.R. Document No. 48. These documents refute Koyo's contention that its bonding rate was zero.

Accordingly, the Court affirms Commerce's Redetermination on Remand on this issue as supported by substantial evidence and in accordance with law.

2. *Computer Programming Errors:*

Timken contends, and Commerce agrees, that in modifying the original computer program to recalculate margins, two clerical or methodological errors resulted which must be corrected in order to derive accurate dumping margins for Koyo's entries made during the period April 1, 1974 to September 30, 1977. *Comments of The Timken Com-*

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[5] The margin established for Koyo's entries on remand was 11.89% for the period April 1974 to July 1976. *Redetermination on Remand* at 10.

pany Regarding Final Remand Redetermination at 1–3. In rebuttal, Koyo contends that Timken's claim of clerical errors should be dismissed as untimely because Timken failed to bring the alleged errors to Commerce's attention within the requisite five business days of disclosure of the remand calculations as required by 19 C.F.R. § 353.28(b) (1994). *Koyo's Brief* at 9–11.

A review of the facts dispels Koyo's claim of untimeliness with respect to the two clerical or methodological errors identified by Timken. One of these errors concerns the failure to make price comparisons based upon identical merchandise, the other pertains to the failure to take into account certain transactions because an exchange rate was not available. The importance of correcting these two errors is confirmed by the record.

Therefore, the Court instructs Commerce to correct the two errors identified by Timken in order to derive accurate dumping margins for Koyo's entries made during the period April 1, 1974 to September 30, 1977.

CONCLUSION

In accordance with the foregoing opinion, this case is remanded to Commerce to correct the two computer programming errors identified by Timken. Upon correction of these two errors, Commerce's Redetermination on Remand is affirmed in all respects.

(Slip Op. 95–112)

POLLAK IMPORT-EXPORT CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 90–09–00484

(Dated June 15, 1995)

ORDER

GOLDBERG, *Judge:* This matter is before the court on remand from the United States Court of Appeals for the Federal Circuit ("CAFC"). *Pollak Import-Export Corp. v. United States,* 13 Fed. Cir. (T) ____, ____, 52 F.3d 303, 308 (1995). The parties had previously agreed to dispose of this action via a Stipulated Judgment on Agreed Statement of Facts, which the court entered on September 16, 1993. The defendant subsequently moved to amend that stipulated judgment. In granting defendant's motion, this court severed certain of the entries at issue and dismissed them for lack of jurisdiction. *Pollak Import-Export Corp. v. United States,* 18 CIT ____, ____, 846 F. Supp. 66, 70 (1994). On appeal, the CAFC reversed this court's modification of the parties' stipulated judgment, and remanded the matter with instructions that this court reen-

ter the stipulated judgment as originally submitted by the parties and entered by the court. The CAFC's mandate having been issued on June 2, 1995, it is hereby:

ORDERED that this court's February 22, 1994 *Judgment Order,* which modified the Stipulated Judgment on Agreed Statement of Facts entered on September 16, 1993, is vacated; it is further

ORDERED that the Clerk of this Court shall reenter the Stipulated Judgment on Agreed Statement of Facts which was originally entered on September 16, 1993; and it is further

ORDERED that the appropriate Customs official shall reliquidate the subject entries and make refund in accordance with the Stipulated Judgment on Agreed Statement of Facts which was originally entered on September 16, 1993, plus interest as provided for by law.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C95/50 6/13/95 DiCarlo, J.	Teklogix Inc.	92-07-00521	8525.20.60 8525.10.80 6%	8471.99.15 Free of duty	Agreed statement of facts	Buffalo Remote radio modules, mobile data collection terminals

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